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IN THE

# Supreme Court of the United States

October Term, 1985

REDCO CORPORATION,

*Petitioner,*

vs.

CBS, INC. and THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AT NO. 82-0263

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## Questions Presented For Review

1. Does The First Amendment Provide CBS, Inc. The Right To Broadcast Knowingly False And Defamatory Information On Its "60 Minutes" News Report, As A Constitutionally Protected "Opinion"?

2. Did The District Court And Third Circuit Court Of Appeals Err In Entering Summary Judgment By Determining The CBS "60 Minutes" "*Killer Wheels*" Program Was True As A Matter Of Law?

3. Should Summary Judgment Be Vacated Where The Supreme Court Of Pennsylvania Overruled State Law Applied By The Federal District Court Placing The Burden Of Proving Falsity Of Defamation On Redco Corporation In A Libel Action Against CBS, Inc.?

4. Did The District Court And Third Circuit Court Of Appeals Err By Entering Summary Judgment Before Redco Had Been Permitted Full Discovery?

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## Reference To Reports Of Opinions Below

The reports of both the District Court and the Third Circuit Court are not known to be reported. A copy of the opinions are set forth in the Appendix attached hereto.

## Statement Of Grounds For Jurisdiction

This Court has jurisdiction by virtue of the act of June 25, 1948, c.646 §1, 62 Stat. 928; 29 U.S.C. §1254(1).

## Constitutional Provisions And Statutes Involved

Constitution: U. S. Constitution Amendment I and Amendment V (Appendix J, p. 168a).

Statutes: Act of July 9, 1976, P.L. 586, No. 142 §2, 42l Pa. C.S.A. §8343(b). Appendix K, p. 169a).

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## Statement Of The Case

This Petition seeks review of a final judgment of a federal court. The District Courts subject matter jurisdiction is based upon diversity of citizenship and an amount in controversy exceeding $10,000.00, 28 U.S.C. 1332(a)(1).

**Procedural History**

On March 3, 1982, Plaintiff, Redco Corporation, hereinafter referred to as "Redco" filed a Complaint against Defendant, CBS, Inc., hereinafter referred to as "CBS" and Defendant, The Insurance Institute for Highway Safety, hereinafter called "IIHS."

The Complaint alleged that on March 8, 1981, and again on September 6, 1981, CBS broadcast a show titled "Killer Wheels", Redco claimed defamation, trade libel, intentional interference with business relations and conspiracy by both Defendants. Appendix A, p. 1a).

Answers were filed by CBS on April 19, 1982 and by IIHS on April 27, 1982.

On December 10, 1982, Redco filed a Motion for an Order Compelling Discovery and a Motion to Compel Answers to Interrogatories.

CBS filed a Motion seeking Summary Judgment on December 27, 1982.

Redco, on January 4, 1983, filed a Motion for Continuance of the Summary Judgment pending completion of discovery. The Court granted the continuance.

CBS filed a Motion for Reconsideration of the Continuance. On April 5, 1983, the Court revoked the continuance and directed Redco to answer and brief the Motion for Summary Judgment.

On January 25, 1984, the Court, while holding that the program was of and concerning Redco, granted Summary Judgment because "the program was based upon true facts, opinions based on true facts or matters of opinion which did not imply the existence of non-disclosed defamatory facts."

Redco filed a Motion to Reconsider the entry of judgment on March 2, 1984. On March 19, 1984, the lower court denied Plaintiff's Motion to Reconsider and directed IIHS to file a dispositive motion as the matter would be listed for trial.

The Court also denied Redco's request that a final appealable order be entered against Redco pending the disposition of the suit against IIHS.

On April 2, 1984, IIHS filed a Motion for Summary Judgment alleging that all matters had been adversely decided against Redco and under the Law of the Case Doctrine, Summary Judgment had to be entered in its favor.

On April 27, 1984, IIHS filed its Brief in Support of the Motion for Summary Judgment.

On April 27, 1984, Redco filed a Request for Proposed Findings of Fact and Conclusions of Law (Appendix B, p. 39a), a Brief in Opposition to IIHS's Motion for Summary Judgment and an Appendix that contained the affidavit of a television communications expert.

On May 10, 1984, IIHS filed a Motion to Strike Redco's Appendix.

On May 31, 1984, Redco filed a Motion for Continuance to Supplement the record with the deposition of Dr. Thomas Benson, the television communications expert, to whose affidavit IIHS had objected. Appendix F, p. 112a.

On June 14, 1984, CBS filed a Memorandum also objecting to Redco's Motion for Continuance to Supplement the record with Dr. Benson's testimony.

On July 16, 1984, the District Court filed an Opinion and Order denying IIHS's Motion to Strike, denying Redco's Motion for Continuance and entering final Summary Judgment in favor of IIHS and CBS.

On August 7, 1984, the case was appealed to the Third Circuit Court of Appeals.

On April 9, 1985, with oral argument being permitted, an Opinion was issued denying the appeal.

A Petition for Reconsideration was filed and denied on May 7, 1985.

This Petition followed.

Because judgment was entered in favor of CBS and IIHS on the District Court's finding that common questions of fact and law governed the claim against both Defendants, this Petition is limited to those common issues that control the action against both CBS and IIHS.

## Factual History

Redco Corporation is located in Red Lion, Pennsylvania, and manufactures multi-piece rims.

On March 8, 1981, and again on September 6, 1981, CBS broadcast a segment on its "60 Minutes" news program titled "Killer Wheels".

The thrust of the program depicted *all* manufacturers of multi-piece wheels as producers of a deadly product that was needlessly killing innocent people for profit. Appendix D, pp. 57a-61a.

Immediately following both broadcasts, Redco, the smallest of five (5) manufacturers of multi-piece wheels, suffered dramatic losses in sales and the cost of liability insurance quadrupled.

The Redco rim consists of two pieces with a reverse nine (9°) degree locking surface. It is a safely designed rim. There were no reports of any fatalities resulting from over four million (4,000,000) sales of Redco rims. Only a few reports of injuries had been noted as of March, 1981.

The "Killer Wheels" program indicated that frequent deaths involving servicemen and innocent by-standers were caused by the explosion of *all* multi-piece rims.

On March 8, 1981, the Redco rim had not killed any servicemen, innocent by-standers or unsuspecting motorists by an accidental explosion.

The District Court, affirmed by the Court of Appeals, determined that the factual matters broadcast in the "Killer Wheels" show, under existing law, was true (Redco could not prove it false) and the innuendo suggesting manufacturers were unethical for needlessly killing innocent people represented a constitutionally protected opinion.

The entry of Summary Judgment is most unusual considering the sworn statements of two of Redco's witnesses.

Dr. Roger McCarthy of Failure Analysis Associates, Palo Alto, California, a national expert on multi-piece rim safety, testified that the factual matters broadcast in the program were *not true.* Appendix N, pp. 242a-275a. He concluded his evaluation of the program by stating:

> "Well, from a technical point of view the factual data is substantially incorrect. The overall direction, thrust and statement of the program would have to be termed deceptive because it misleads the public as to the true safety and true benefits of multi-piece rims. . .it could lead to increased accidents and increased danger on the highway; and rather than being an aid to safety it could work to decrease safety in this country." Appendix N, pp. 274a-275a.

Dr. Thomas Benson stated that CBS specifically designed their "Killer Wheels" show to impress the public as a *factual, not* an opinion broadcast. Appendix D, pp. 66a-67a.

The District Court's analysis of what an average viewer would believe is most puzzling when overlayed with one specific finding of the Court. CBS had argued that because Redco was not specifically named on the program, it was not "of and concerning Redco."

The Court rejected this part of CBS' argument and held that under the settled legal principles of group libel the average viewer could conclude that the program was about Redco and Redco's product.

Why then wouldn't the average viewer believe that Redco was killing people with its product? If Redco was not killing people with its product and if the program was about Redco's product would not just the title "Killer Wheels" be a defamatory publication?

The District Court, however, never answered these questions. When they were brought to the attention of the Appeals Court it simply stated "Because Redco admitted its rim had injured people the fact that at the time of the broadcast no one had died from injuries sustained in a Redco wheel rim accident does not make the general assertions about multi-piece rims untrue." Appendix I, p. 165a.

The Court blindly limited its review to the general assertion that multi-piece rims are dangerous, as argued by CBS. If the review had considered the actual defamatory message of the "Killer Wheels" show, as concerns Redco, *i.e.* that it has killed people with its product for the profits, despite a safe alternative, the error in the District Court's Summary Judgment Order would have been obvious.

To prove the actual message conveyed, Redco presented the affidavit of a television communication expert.

Dr. Thomas Benson stated that in the 60 Minutes "Killer Wheels" show:

> "By using 'special' editing techniques and structuring the show to induce predictable emotions in the viewers. . .CBS 'casts the show as a drama involving innocent victims, friendly witnesses, or indignant but objective reporters (backed up by the resources of a network of information gatherers) and a heartless industry with something to hide.' " Appendix D, pp. 66a-67a.

The "special" editing techniques were described by Jack Bradley, a person interviewed on the program, as so unfair that "it was not the same interview he had given." Appendix M, p. 220a.

Bradley testified that he was invited by CBS to New York "to explain as an expert to CBS the different types of truck wheels in use." He had no idea he was being brought there to be impeached and cross-examined. Appendix M, pp. 215a-216a.

Dr. Benson in evaluating Mr. Bradley's interview on the program states:

> "The techniques of interviewing and television narrative employed in "Killer Wheels" in such a way as to make Jack Bradley represent the industry, and to make him appear not only heartless but dishonest. He is the only witness whose story is cross-examined, his answers are clearly distorted in meaning by their placement in context, and it may be that editing has been used to put some of his answers directly out of context, a fact which cannot be verified without inspection of the pre-edited interview materials."[1] Appendix D, pp. 67a-68a.

and

> Every reasonable viewer must believe at this point in the broadcast that multi-piece rims are dangerous. . .when Bradley makes an engineer's answer to the question of whether multi-piece rims are dangerous (he says, "they are not dangerous"),

[1] Jack Bradley requested a copy of an unedited transcript of his interview with Mike Wallace. (R. 898a). He was refused a copy of the transcript. This position is in contravention of CBS, Inc.'s own published News Standards. (R. 1105a). CBS refuses the similar request of Redco despite Bradley's consent on the ground that the interview is constitutionally and statutorily privileged information. The lower court did not determine whether the information should be disclosed as the Summary Judgment rendered the matter moot.

> any audience member who has seen the demonstration films and mutilated victims and grieving parents must take Bradley for a fool or liar. Appendix D, p. 67a.

Bradley's reaction to the "Killer Wheels" presentation of his interview was one of shock. He insisted that the questions and answers were not of order and were changed around and edited into a completely different program. Appendix M, pp. 223a-224a.

Paul Hykes, a former employee of the Budd Company who had written a letter severely criticizing the RH5° multi-piece rim manufactured by The Budd Company, was contacted by a CBS researcher. (R. 946a-951a).

In sworn testimony Mr. Hykes declared that he told the CBS representative that his letter of 1969 was "wrong."[2]

A report of Dr. Roger McCarthy had changed his mind. He mailed a copy of the report to CBS. (R. 946a-948a).

Dr. McCarthy found fatalities from multi-piece accidents were extremely rare, so rare, that random lightning strikes killed ten (10) times as many people as all servicing accidents with multi-piece rims. Appendix N, p. 239a.

In early 1981, CBS was researching the program they eventually broadcast on March 8, 1981, about multi-piece rims.

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[2] Mike Wallace used the letter to impeach Jack Bradley without advising anyone that the letter had been recanted.

Dr. McCarthy spoke with the researcher for several hours explaining that his research confirmed the safety of multi-piece rims and the dangers of single piece wheels that also have the same explosive potential as multi-piece rims. Dr. McCarthy also referred the CBS researcher to a Mr. Robert Gaines who was also doing a study of multi-piece rims for the National Highway Traffic and Safety Administration. (R. 836a, 837a).

The report prepared for South Coast Technology, Inc. by Mr. Gaines, dated February 6, 1981, confirmed that there were a substantial number of single piece accidents that had occurred causing death and injury. The report suggested that the single piece rim and the multi-piece rim had about the same accident frequency. (R. 1050a).

## REASONS FOR ALLOWANCE OF THE WRIT

The record establishes that a national television network has manufactured a controversy and published substantially false and misleading information. Redco Corporation has suffered $250,000.00 or more in damages and its products liability insurance has quadrupled. Despite the losses Redco has been denied the right to a trial by jury.

The District Court departed the accepted and usual course of judicial proceedings in several additional ways.

First, the holding that the innuendo suggesting that the manufacturers were "unethical" was a constitutionally protected "opinion" was an unwarranted extension of constitutional protection.

No viewer watching a CBS "60 Minutes" Program could reasonably be expected to believe that they were receiving an "opinion" which was based upon less than all the available facts. If CBS has performed journalistic "dirty tricks" through unethical editing techniques[3] or consciously suppressing known relevent facts which are necessary to comply with their avowed public standards of objective and truthful reporting, the "opinion" defense should not be theirs to claim.

A national television network that holds itself out to be reporting matters in a true and complete manner should not have the right to knowingly publish false information as a constitutionally protected opinion.

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[3] Redco suspected CBS of distortion of interviews by improper editing techniques and the very questionable use of techniques of persuasion apparent to an expert in the field of television journalism. Appendix D, p. 51a. Redco was denied discovery of "outtakes", only the testimony of Jack Bradley confirms this factual question. (See *infra*, pp. 67a-68a).

Next, the Court refused to characterize the libel actually alleged by Redco. (See Request for Findings of Fact and Conclusions of Law, Appendix B, p. 39a). Rather, the Court, following the argument of CBS, held the average viewer would only understand from viewing the "Killer Wheels" show that multi-piece rims were "dangerous."[4]

This characterization permitted the Court to find as a matter of law that the program was "true."

Redco's requested discovery that sought outtakes and other material needed to establish intentional program falsification and malice was held to be irrelevant and "moot".

Even without the discovery, the record suggests, at least, a factual question on whether CBS prepared and published a program that it knew was simply not true.

Summary Judgment on the basis that the program was true. . .ignored the allegations of Redco's Complaint, (Appendix A, 7a-8a) and the law of Pennsylvania that holds even the literal accuracy of separate facts will not render a communication true if the implication of the communication as a whole is false. *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899 (1971).

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[4] The television show portrays the defamatory message far more effectively than the written transcript which is attached to Plaintiff's Complaint. (Appendix A, p. 25a). The Court is urged to view the program. A copy of the video taped program has been furnished by CBS, Inc. and is part of the record. The Plaintiff will furnish the necessary equipment to view the tape upon request by the Court.

Finally, while on appeal, the Pennsylvania Supreme Court held constitutional a Pennsylvania statute placing the burden of proving truth on the defendant. *Hepps v. Philadelphia Newspapers, Inc.*, _____ Pa. _____, 485 A.2d 374 (1984) (certiorari granted). (Appendix L, p. 170a. The Summary Judgment was entered on the mistaken belief that the burden of proving truth could not be placed upon the Defendant under the law of Pennsylvania.

If this Court determines that the procedure is constitutional as set forth in *Hepps*, the Summary Judgment in this case should be vacated.

## EXPANDED ARGUMENT

**I. Does The First Amendment Provide CBS, Inc. The Right To Broadcast Knowingly False And Defamatory Information On Its "60 Minutes" News Reports, As A Constitutionally Protected "Opinion"?**

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339, 41 L.Ed. 2d 789, 805, 94 S. Ct. 2997 (1974), the court noted that. . ."Under the First Amendment (Appendix J) there is no such thing as a "false idea. . .However pernicious an opinion may seem we depend for its correction not on the judges and juries, but on the competition of other ideas."

If there is no such thing as a "false idea", there *is* such a thing as a "false opinion."

There is strong evidence in the record that CBS knew or had reason to know that multi-piece rims were not safer than single piece rims and that the manufacturers were not needlessly killing innocent people for profit. Appendix N, pp. 235a-275a.

If "Killer Wheels" was an opinion of CBS News, there are several valid reasons why such an opinion should not be given constitutional protection.

*First:* Fifty-seven million (57,000,000) people saw the broadcast of "Killer Wheels". These viewers had been conditioned to believe they were receiving truthful, objective, factual reporting.

It is submitted of the fifty-seven million (57,000,000) people who viewed the program, all but a small percentage believed the show to be a *factual news program* not an "opinion program." (See Appendix C and D, pp. 46a-68a). Redco alleges that it suffered dramatic financial losses in lost sales and increased

insurance costs. Whether the losses were caused by an intentionally fabricated opinion or the intentional publication of false facts. . .the harm is the same. How can a small corporation like Redco reach fifty-seven million (57,000,000) people to correct the erroneous and defamatory message?

There is only one answer. If the opinion is falsely held and Redco can prove the falseness, then a jury trial should be allowed. The concept that a "pernicious opinion" can only be corrected by other ideas is impractical and unrealistic when applied to a national television network.

*Second:* Granting unlimited power to a giant television network in the form of "opinion immunity" encourages irresponsible use of the freedom. Why would CBS fabricate a controversy and express a falsely libelous opinion? The answer is profit.

Broadcasters are vehement in their claim for a need to be free of censorship in new dissemination. When motivated by lofty values and a genuine desire to tell the truth to the public, there should be no restraint. However, human beings often depart the ideal and lofty values are somtimes jaded by more mundane ones. When it is more profitable for a corporation to lie, it may do so. Access to a jury trial is the only safeguard an individual has against abuse by any large corporate news network. An "opinion immunity" as interpreted by CBS and applied by the lower federal courts all but removes this safeguard.

*Third:* The expression of defamatory opinions that cause serious damage creates a conflict within the constitution. Property is not to be taken without due process of law under the Fifth Amendment. Appendix J, p. 168a.

In "Killer Wheels" Redco was tried and convicted with evidence that would not have been admitted against it in a court of law. It was denied the right of cross-examination. It has suffered substantial damage and has been denied a jury trial. In the zeal to protect a First Amendment right of CBS, a Fifth Amendment right of Redco has been violated.

*Fourth:* The "opinion-fact" distinction is just not capable of fair application.

Courts have been struggling unsuccessfully with the distinction between fact and opinion for decades. *Goldwater v. Gindburg*, 261 F. Supp. 784, 786 (S.D. NY 1966) aff'd 414 F.2d 324 (2nd Cir. 1969) *cert. den.* 396 N.S. 1049 (1970), quoting Prosser on Torts, 3rd Ed. 1965 (distinction "has proved to be most unsatisfactory and an unreliable one, difficult to draw in practice") of McCormick on Evidence §11 at 23 (2nd Ed. 1972):

> The classic formula, based as it is on the assumption that "fact" and "opinion" stand in contract and hence are readily distinguishable, has proven the clumsiest of all tools furnished the judge for regulating the examination of witnesses. It is clumsy because its based assumption is an illusion.

There is just no sound, logical or reasonable device for distinguishing statements of fact from statements of opinion. The difficulty has permitted subjective beliefs of the District judge to deny Redco a trial by jury. There are no standards to measure what is and what is not an opinion. It has become a matter, perhaps because of the uniqueness of the media, over which able minds can reasonably differ.[5]

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[5] The District Judge viewing "Killer Wheels" agrees with CBS that the program is an "opinion." Dr. Thomas Benson, a television communication expert has filed an affidavit that the average viewer would understand the program as "fact." Appendix C and D, pp. 46a, 66a-67a.

It is submitted that the question is really one for the jury. Expert witnesses and proper instructions bring a measure of reason to an otherwise unreasoned part of the law. Proof of defamation should be the Plaintiff's burden before the jury, like any other element in the case.

Whether the defamation is cast as an "opinion" or an assertion of fact, the damage is the same. The instant exposure of defamatory matter to fifty or one hundred million people has so drastic an effect, that the source of such broadcasts must be compelled to act responsibly. The ambiguity of the "opinion-fact" approach encourages irresponsibility. The "opinion fact" distinction should be abandoned by the Court where it can be shown that the opinion was falsely or maliciously expressed.

*Fifth:* The potential for serious harm resulting from opinions is the same as factual assertions. For example, in Maryland, as a result of the "Killer Wheels" show, an effort was made to force the replacement of all multi-piece wheels on school buses with single piece wheels. (R. 754a-780a). Appendix E, pp. 75a-86a.

The Phase IV Report of Failure Analysis Associates states that:

> Single piece rims and tubeless tires in school bus use have demonstrated a total accident frequency 13 times higher than multi-piece wheels and 25 times higher on the highway. P. 23 (R. 1029a).

Redco submits that the potential effect for ill cause by the program requires close scrutiny by this Court.

Society's interest in "order and morality" mandate sufficient effort at truth telling by a major television network to avoid harm to the open minded viewer.

The efforts of Maryland's school administrators to act on the false information disseminated by CBS in the "Killer Wheels" show is ample evidence of the improper factual message conveyed and understood. (R. 754a-780a). Appendix E, pp. 75a-86a).

Finally, a national broadcasting company like CBS possesses almost unlimited power to persuade the public to its point of view. If the power is abused it may harm vast numbers of people. If false opinions are communicated there is no way the average citizen who is harmed can correct the falseness. There is no remedy if those injured are left to compete with a broadcast giant. Such power, unshackled, can cause much mischief.

Chief Justice Berger recognized the problem in his concurring opinion in *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 55 L.Ed. 2d 707, 98 S. Ct. 1407 (1978).

> . . .medical conglomerates as I describe pose a much more realistic threat to valid interests than do appellants [Bank associations. . .] The growth of modern media empires "has been to place in a few hands the power to inform the American people and shape public opinion." p. 731.

Constitutional rights should be shared equally or be subject to restraint. In *Herbert v. Lando,* 441 U.S. 513, 60 L.Ed. 2d 115, 29 S. Ct. 1635 (1979), Justice White explains:

> Those who publish defamatory falsehoods with the requisite culpability. . .are subject to liability. The aim being not only to compensate for injury, but also to deter publication of unprotected material threatening injury to individual reputation. *Id.* at 131.

Constitutional rights should never encourage or permit national television networks to knowingly mislead the viewer. Deliberate or reckless falsehoods serve no First Amendment ends and deserve no protection under that Amendment. *Pickering v. Board of Education*, 391 U.S. 563, 583, 20 L.Ed. 2d 811, 826, 88 S. Ct. 1731 (1968).

The First Amendment should not permit a national television news network to publish knowingly false and defamatory information as a constitutionally protected "opinion."

**II. Did The District Court And Third Circuit Court Of Appeals Err In Entering Summary Judgment By Determining The CBS "60 Minutes" *"Killer Wheels"* Program Was True As A Matter Of Law?**

The District and Appellate Court also made the determination that the "Killer Wheels" was true despite the fact that the record established that the Redco wheel had not killed anyone.

The District Court made the determination that the "Killer Wheels" broadcast was true as a matter of law. It did this by addressing specific statements Redco claimed were dafamatory. Appendix G, pp. 137a-143a.

Instead of determining whether the statements were defamatory, the Court set about determining if they were true and concluded as a matter of law that they were.

Each of the statements and actions were likewise analyzed by Dr. Roger McCarthy, an expert on multi-piece rim safety. Appendix N, pp. 242a-275a. Dr. McCarthy's sworn analysis was contrary to the Courts' conclusion. As an engineer, he found the statements untrue.

> . . .it (Killer Wheels) was erroneous in its overall thrust. It was affirmatively misleading in its statements about single piece rims. In general I would say to the extent that it had factual information to convey, a substantial portion of those observations that purported to be facts were just plain wrong. Appendix N, p. 243a.

This testimony of Dr. McCarthy raised serious factual issues that could only be resolved in a jury trial.

The District Court correctly ruled that the program was of and concerning Redco:

> The fact that Redco was not specifically named in the broadcast is not controlling. A party alleging defamation need not be specifically named in the description or circumstances tend to identify the party. Appendix G, p. 129a.

Redco's expert in television communication stated that the average viewer would believe that *all* multi-piece rims kill people and that the manufacturers do this because they do not care about the human suffering caused by their product. Appendix C and D, pp. 47a, 52a-53a.

If the Redco rim had killed no one (see Appendix E, p. 72a). . .how could the Court correctly rule as to Redco that the program was true? If group libel is alleged in which Plaintiff is not named but is readily identified because of the smallness of the group (decided in Redco's favor), then the statement must be true *as concerns the plaintiff. Restatment Torts Second,* §518A, comment C, §564A, comments B, C, D; *Children v. Shinn,* 168 Iowa 531, 150 N.W. 864 (1915).

The question of truth is a question for the jury. *Restatement Torts Second,* §617(b).

For the Court to rule that the program was of and concerning Redco and that the viewers would understand the "Killer Wheels" program to be about Redco, *but* that they would not understand Redco to be making a "killer rim" that was causing part of the "needless killing" is an egregious error.

The Court ignored the inconsistency and followed the argument of CBS that the program simply stated that multi-piece rims are "dangerous."[6]

Whether a broadcast can be understood as being defamatory is for the Court to decide. *Steaks Unlimited, Inc. v. Deaner,* 623 F.2d 264 (3rd Cir. 1980).

However, the Court is bound to safeguard "due process" in the exercise of its function. *Hovey v. Elliott,* 167 U.S. 409, 42 L.Ed. 215, 17 S. Ct. 841 (1867). It is the function of the Court to determine if the publication is capable of a defamatory meaning as it could be understood by the average viewer. *Steaks Unlimited, Inc., supra,* p. 269.

Redco submits it was a fundamental error of law for the Court to decide the statements were true. Under Pennsylvania law, the Courts role in a libel case is to determine if the statements are capable of a "defamatory" meaning. The jury is to determine whether the statements are true. Appendix K, p. 169a. *Restatement Torts Second,* §617B.

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[6] No Plaintiff could ever win any law suit claiming libel when the defendant is permitted to state the issue involved. A publication falsely asserting that a woman murdered her husband by stabbing could be characterized as a program stating that knives are dangerous. Could the plaintiff ever win an argument that knives are not dangerous or that this assertion was only a constitutionally protected opinion?

While Redco's experts could not control the Court's view of the program, absent some extraordinary circumstances not here present, the District Court should have explained why the experts' evaluation concerning what its average viewer would understand was not being followed. These matters were squarely presented to the Court in Redco's proposed Request for Findings of Fact. Appendix B, pp. 40a-41a.

Redco is entitled to all reasonable inferences that flow from the evidence being drawn in its favor. *Marine Midland Bank v. Smith*, 482 F. Supp. 1279 (1979). In considering the propriety of entering Summary Judgment in a libel case, the Court must determine whether under the facts construed in light most favorable to Redco, whether the broadcast is capable as being understood as defamatory.

If the libel is characterized as an assertion that Redco has produced a product that has killed people (Appendix C and D, pp. 46a-68a) there is an issue of fact as Redco denies killing people with its product. (Appendix E, p. 72a). If the libel is characterized that multi-piece wheels kill while single piece wheels do not, there is an issue of fact as this point is controverted. Appendix N, pp. 247a-248a. If the libel is characterized as Redco needless killing for the profits to be made, this too, creates an issue of fact as Redco denies the statement.

Even when the underlying facts are not contested (the facts are contested in the instant case), there may remain fact questions on inferences to be drawn from the facts which preclude Summary Judgment. *Nader v. De Toledano*, 408 A.2d 31, 54 (D.C. C.A. 1979) *cert. den.* 44 U.S. 1078 (1980); *E.D. Systems Corp. v. Southwestern Bell Tel. Co.*, 674 F.2d 453 (C.A. Tex. 1982).

While CBS has characterized the libel as dealing with the "dangers of multi-piece rims" and that all the defamatory facts were true, the facts and the inferences drawn from the broadcast readily permit characterization of the libel as submitted by Redco and confirmed by its experts.

The assertion that Redco is killing people with its product for the profits to be made, if false, is clearly libellous. Such a communication goes beyond hyperbole, flippant style, or colorful language permitted *Sellers v. Time, Inc.*, 229 F. Supp. 582, 585 (E.D. Pa. 1969); *Goodrich v. Waterbury Republican American*, 188 Conn. 107, 448 A.2d 1317 (1982). Such a communication. . ."harms the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Cosgrove S. C. V. Shop, Inc. v. Pawe*, 408 Pa. 314, 318, 182 A.2d 751, 753 (1962).

For the Court to enter a Summary Judgment on the basis that the publication was "true", is contrary to the law and facts presented.

The Redco rim is not a "killer wheel." It has killed no one. The technical facts presented by CBS are not true.

An issue for detemination by the jury is present. The Summary Judgment should be vacated and a jury trial ordered.

**III. Should Summary Judgment Be Vacated Where The Pennsylvania Supreme Court Overruled State Law Applied By The Federal District Court Placing The Burden Of Proving Falsity Of Defamation On Redco Corporation In A Libel Action Against CBS, Inc.?**

The District Court noted: "CBS claims the *Redco cannot refute* the veracity of the statements and that Redco merely is upset that more favorable facts or opinions were not presented in the program." Appendix G, p. 127a.

The District Court then set forth the principles of law that placed the burden of proving falsity of the publication upon Redco. Appendix G, pp. 133a-135a.

The case was briefed, argued and decided on the concept that under Pennsylvania law, Redco had to prove the falsity of the publication. The Court entered Summary Judgment and the Appeals Court affirmed on the same basis.

On December 14, 1984, the Supreme Court of Pennsylvania in *Hepps v. Philadelphia Newspapers, Inc.*, _____ Pa. _____, 485 A.2d 374 (1984) (certiorari granted) (Appendix L, p. 182a), overruled *Dunlap v. Philadelphia Newspapers*, 301 Pa. Super. 475, 448 A.2d 11 (1982) relied upon by the District Court. The *Hepps* decision held the Pennsylvania statute placing the burden of proving the truth of a defamatory publication on the defendant was constitutional.[7]

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[7] Burden of Defendant—In an action for defamation, the defendant has the burden of proving, when this issue is properly raised:

(1) The truth of the defamatory publication.
(2) .....

42 Pa. C.S.A. §8343(b)(1).

The dramatic change in the law was brought to the attention of the Third Circuit Court of Appeals by a Petition for Reconsideration that was refused without opinion.

It is submitted that the Pennsylvania law placing the burden of proving truth on the Defendant in a libel action is constitutional. Justice Nix in a well reasoned opinion explained the decision of the constitutional issue as follows:

> "We are satisfied that Pennsylvania law makes a constitutionally acceptable accommodation between the freedom of expression required by the First Amendment and our law of civil libel for compensatory damages brought by a private individual to redress defamatory falsehood. . .The First Amendment has not been extended. . .to condone or encourage irresponsible conduct by the media in its exercise of informing the public of newsworthy events.
>
> Nor can we conceive of a constitutionally protected interest in condoning the media's malicious or negligent discharge of this responsibility. Free debate will not be encouraged by allowing it to become the forum for malicious or negligent abuse of the reputation of those involved in the controversy. The right to criticize must carry some degree of responsibility, particularly where it may jeopardize the reputation of a private citizen."

The decision of the Pennsylvania Court creates a conflict with many other federal decisions, including the Third Circuit Court of Appeals. *Steaks Unlimited, Inc. v. Deaner,* 623 F.2d 264, 274-75 N. 49 (3rd Cir. 1980).

It is submitted that this Court should follow the Pennsylvania Supreme Court's decision to require that the burden of proving truth to be on the Defendant.

Does the *Hepps* decision really make a difference concerning this case?

Redco was forced to prove that their product was not a "killer." The fact that Redco had no evidence that it had not killed was not good enough for the District Court. Redco could not prove the negative.

In *Hepps,* the Court specifically recognized the difficulty of putting the burden on the Plaintiff to prove falsity previously noted in *Corabi v. Curtis Publishing Company,* 441 Pa. 432, 273 A.2d 899 (1971).[8]

> . . .where the accusation is totally general and without specificity necessary for a response, the absence of such a presumption would force the Plaintiff in the unenviable position of proving the negative.

*Hepps, supra,* 378 (citing *Corabi, supra,* at 450, 273 A.2d at 907).

The Defendants presented no evidence that Redco rims had killed people. The Defendant produced no evidence that single piece rims are a safe alternative to multi-piece rims. The Defendants produced no evidence that Redco was knowingly selling a "killer" product for the profits to be made.

The Defendant has produced no evidence that the Plaintiff Redco has done any of the defamatory matters charged in the program.

The Appellate Panel's statement that, "the fact that at the time of the broadcast no one had died from injuries sustained in a Redco accident does not make the general assertions about multi-piece rims untrue", is a misapplication of law caused by the placement of proving falsity on Redco.

---

[8] Pennsylvania by statute has not made truth an affirmative defense. Act of July 9, 1976, P.L. 586 No. 142, §2; 42 CPSA §8343(b)(1).

The *Restatement of Torts Second*, §581A, comment g., p. 237, specifically holds that truth as a defense must be determined *at the time of the publication.*

> "Facts alleged to exist by the defamer may subsequently occur, but his foresight or luck in anticipating them will not protect him from liability for stating their pre-existence."

CBS has not and cannot prove the truth of the defamatory assertions of their program.

If the burden is put on the Defendant to prove truth, then the question of whether or not the false and defamatory statements made by CBS were true, becomes a jury question as a matter of law. *Restatement Torts Second*, §617B.

The Summary Judgment entered by the District Court should be vacated and a jury trial ordered

**IV. Did The District Court And Third Circuit Court Of Appeals Err By Entering Summary Judgment Before Redco Had Been Permitted Full Discovery?**

Redco promptly filed a Motion to Compel when CBS refused to release the "outtakes"[9] and other documents, notes, memoranda, and including the producer's "blue sheet" developed or used in the production of "Killer Wheels."

In support of the Motion, counsel for Redco affirmed that Redco desired to obtain an affidavit of Dr. Benson *after* he had an opportunity to review the outtakes.

Redco also alleged the need to review the material to prove that it was false in context.

Later in an affidavit represented by the Court to enumerate facts alleged to be in dispute or need to be identified, Redco again requested the outtakes of Jack Bradley's interview to determine if CBS falsely presented the context of his interview.

The Court granted judgment without compelling any discovering holding the discovery request moot.

Much if not all of the informating concerning the truthfulness of both the factual assertions and the so called truthful disclosed facts that formed the basis of the shows "opinion" were in the exclusive control of CBS.

Redco needed the discovery to allow its expert to provide additional professional opinion testimony to the Court concerning what the average viewer would understand and why, that the literal factual statements though true were false in context and why. And, finally,

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[9] The portions of the video taped interviews not televised in the program.

because a visual medial was involved, how the presentation of the viewed material created a meaning different from what the written transcript allegedly communicated. Appendix F, p. 112a.[10]

"60 Minutes" is a news program. CBS has published written standards representing their news presentations to be truthful and objective.

Mike Wallace, a CBS correspondent, testified in deposition that the published standards of CBS were promulgated and adopted to assure accurate, undistorted, impartial and truthful presentations of news programs. (R. 826a).

There is a kind of fraud involved when a national broadcast company surreptitiously violates its public statement of what it is broadcasting to the news viewers. Discovery of the extent of the fraud was important to preparation of the case.

The denial of Plaintiff's discovery was fundamental error. The discovery rules were adopted to obtain the fullest possible knowledge of the issues and facts before trial. *Hickman v. Taylor*, 329 U.S. 495, 91 L.Ed. 2d 451, 67 S. Ct. 385 (1947).

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[10] Television is unique. Written transcripts cannot provide the context of the message. For example, in a television drama, the portrayal of a child with teasing eyes who gently takes her father's hand, looks up and says "I hate you" in a soft and musical voice. . .communicates to the viewer a message that is completely opposite to the spoken words. The importance of having outtakes in a television libel case cannot be overemphasized. Where truth of the communication is at issue or where the segments are argued as opinions it is only with the outtakes that an expert can determine what question was asked and answered in fact as compared to what was broadcast. An apparently truthful statement on the broadcast may in fact be false in the actual context given.

## Conclusion

In "Killer Wheels", CBS crossed the line that separates the mere exploitation of a constitutional right from its unreasonable abuse.

Redco has suffered substantial damages from the premeditated publication of knowingly false and defamatory information.

Redco has been denied the opportunity to prove its claim before a jury because the Lower Federal Courts have decided that the Constitution and libel law requires this result.

Either the Lower Courts are in error or the law should be changed.

Redco prays your Honorable Court to vacate the Summary Judgment entered in favor of CBS and IIHS.

Respectfully submitted,

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## APPENDIX A

**Plaintiff's Complaint with Killer Wheels Transcript**

IN THE
UNITED STATES DISTRICT COURT
For the Middle District of Pennsylvania

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REDCO CORPORATION,

vs.

CBS, INC., and THE INSURANCE
INSTITUTE FOR HIGHWAY SAFETY.

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Civil Action—Law
No. _____
Jury Trial Demanded

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COMPLAINT

AND NOW, TO WIT, this 3rd day of March, 1982, comes Plaintiff Redco Corporation by its attorneys, Laucks & Monroe, and files this Complaint of which the following is a statement:

1.

Jurisdiction is founded on diversity of citizenship and amount in controversy in excess of $10,000.00 (28 U.S.C. §1332(a)(1)).

2.

Plaintiff Redco Corporation is a small, family owned Pennsylvania corporation with offices in Red Lion, York County, Pennsylvania.

*Appendix A—Plaintiff's Complaint with Killer Wheels Transcript.*

3.

Defendant CBS, Inc., (hereinafter referred to as "CBS") is a New York corporation, with offices at 51 West 52nd Street, New York, New York, 10019.

4.

Defendant The Insurance Institute for Highway Safety (hereinafter referred to as "IIHS") is a national association with offices at 600 New Hampshire Avenue, Suite 300, Washington, D. C., 20037.

5.

Plaintiff Redco Corporation is a manufacturer of multi-piece rims for trucks, buses, and recreational vehicles.

6.

Plaintiff is one of five manufacturers of multi-piece wheel rims in the United States.

7.

Each of the acts of Defendants alleged herein was accomplished by an employee or agent of Defendants acting within the scope of his or her employment.

8.

On March 8, 1981, Defendant CBS, Inc. by its news division CBS News broadcast a television program entitled "Killer Wheels" over nationwide network television, which program was rebroadcast on September 6, 1981. The program was a part of the CBS magazine "60 Minutes." A copy of the transcript of said broadcast is marked Exhibit A, attached hereto and incorporated by reference.

*Appendix A—Plaintiff's Complaint with Killer Wheels Transcript.*

9.

Defendant CBS represents its program "60 Minutes" to be factual non-fiction news-reporting program and not a forum for fictional presentations.

10.

Millions of television viewers were exposed to each of the two broadcasts.

COUNT I

TRADE LIBEL – DISPARAGEMENT

11.

All preceding and succeeding paragraphs are hereby incorporated by reference.

12.

Defendant CBS by its news division in preparing and editing the broadcast used statements, innuendo, overstatements, unfair comparisons and distorted analogies which were false and misleading concerning Plaintiff and the products manufactured by Plaintiff.

13.

The false and misleading statements, innuendoes, overstatements, unfair comparisons, and distorted analogies included but were not limited to the following.

A. Many truck drivers and tire mechanics call multi-piece rims "killer wheels."

B. Accidents involving multi-piece wheel rims according to United States Government statistics have killed more people than have died in accidents involving the Ford Pinto or the Firestone 500 tire.

C. The broadcast included a film prepared by Defendant IIHS which film involved the use of a severely altered multi-piece rim prepared for the sole purpose of making the rim explode.

D. When a multi-piece rim explodes it hits whatever is in the way, which is "very often" a serviceman's head.

E. Multi-piece rims spontaneously fall out of place.

F. It is untrue that multi-piece rims are not safe unless improperly serviced.

G. Accidents involving multi-piece rims often involve innocent bystanders.

H. The multi-piece rim is more hazardous than the single piece rim.

I. "A good number of accidents occur after the tire is inflated and out of the safety cage."

J. Paul Hykes, a former chief engineer of a multi-piece rim manufacturer, is of the opinion that multi-piece rims are dangerous.

K. Data showing problems regarding one single model of multi-piece rims applies to all multi-piece rims although designed differently.

*Appendix A—Plaintiff's Complaint with Killer Wheels Transcript.*

14.

Defendant CBS, Inc. knew that the broadcast was false and misleading or in the alternative acted in reckless disregard of the truth of the broadcast for the following reasons:

A. Defendant prepared the broadcast without collecting sufficient objective evidence and relied upon data which formed no technical basis for the conclusions presented in the broadcast.

B. Defendant had a Value Engineering report which showed that the multi-piece rim shown in the Insurance Institute for Highway Safety film was severely altered for the sole purpose of making the rim explode. Despite this information Defendant displayed the film without any explanatory comment.

C. Defendant had been provided with a report titled "Phase III" and data collected by Failure Analysis Associates, a leading failure analysis firm which found that multi-piece rims are safe unless improperly serviced. A copy of the Phase III report had been mailed to Defendant. Defendant made no reference to this report in its broadcast.

D. Defendant knew that the letter by Paul Hykes read in the broadcast no longer represented Mr. Hykes' opinion. Mr. Hykes had told Defendant that he had recanted his previous opinion and actually gave Defendant full data to back up his new opinion that multi-piece rims are safe.

15.

The publicity presented by Defendant CBS in its broadcast was solicited by Defendant IIHS.

16.

Defendant IIHS provided much of the unfair, slanted, improper evidence used by Defendant CBS in its program, including, inter alia: Defendant IIHS prepared the film used on the presentation "Killer Wheels" which purported to show the hazards of explosion of multi-piece rims and Defendant IIHS knew that such explosions could only be achieved by altering the product severely from its original manufactured form in a fashion which does not occur under normal use.

17.

Defendant IIHS by its agents, servants and employees presented televised statements on Defendant CBS's program "Killer Wheels" which televised statements Defendant knew or in the exercise of due care should have known had no valid factual basis. Said testimony included but is not limited to:

A. Multi-piece rims explode "like a shell out of a cannon into whatever is in the way which is very often a serviceman's head."

B. That IIHS has reported deaths involving multi-piece rim explosions "but we are reporting what's known and we have every reason to believe that what's known is just the tip of the iceberg because no data are collected on these."

C. That the accidents involving multi-piece rim explosions "often involve innocent bystanders."

18.

Defendant IIHS presented to Defendant CBS anecdotal examples of multi-piece rim explosions for use to malign the product per se when Defendant knew or in the exercise of due care should have known that such incidents involved misuse or improper servicing of the said multi-piece rims.

19.

Defendant IIHS publicized through Defendant CBS in the "Killer Wheels" program, its conclusion that multi-piece rims should not be available for sale when Defendant IIHS knew from its own in-house engineer that it had no sound technical basis to arrive at such conclusion.

20.

Defendant IIHS represented to Defendant CBS that the multi-piece rim was more hazardous than the single piece rim when Defendant IIHS had done no studies on single piece rims and knew from information provided to it by a qualified engineer that multi-piece rims are as safe as single piece rims.

21.

The data which Defendant IIHS presented to Defendant CBS was not collected scientifically but was rather collected in an effort to achieve the pre-determined result that multi-piece rims are unsafe.

22.

Defendant IIHS knew that the material it provided to Defendant CBS was false and misleading or in the alternative presented the material to Defendant CBS in reckless disregard of the truth.

23.

Defendants' disparagement of Plaintiff's product as set forth in this Complaint was done without privilege.

24.

Defendants' disparagement of Plaintiff's product as set forth in this Complaint was done for the purpose of having multi-piece rims removed from the market.

25.

Defendants recognized or should have recognized that their actions would result in pecuniary loss to Plaintiff Redco Corporation by causing customer loss, loss of sales, rise in insurance premiums, and an increase in unfounded products liability law suits.

26.

As a result of Defendants' conduct, Plaintiff has suffered a loss in profits in excess of $10,000.00.

27.

As a result of Defendants' conduct, Plaintiff's insurance premiums were raised from $4.00 per $1,000.00 worth of coverage to $15.00 per $1,000.00 worth of coverage despite the fact that Plaintiff has the best safety record of all manufacturers of multi-piece rims.

*Appendix A—Plaintiff's Complaint with Killer Wheels Transcript.*

28.

Products liability law suits against Plaintiff tripled as a result of the broadcast sensitizing Plaintiff to be the target of unfounded products liability suits.

29.

As a result of Defendants' conduct, Plaintiff has been exposed to bias and prejudice of the public which forms the jury pool in any products liability suit brought against Plaintiff.

30.

The conduct of Defendants was outrageous and Plaintiff is entitled to punitive damages.

WHEREFORE, Plaintiff Redco Corporation requests your Honorable Court to award compensatory damages in excess of $10,000.00 together with punitive damages, interest and cost of suit.

COUNT II

DEFAMATION

31.

All preceding and succeeding paragraphs are hereby incorporated by reference.

32.

During the above stated broadcasts of "Killer Wheels", and in preparation thereof, Defendants made false and defamatory statements and innuendoes concerning Redco Corporation, including but not limited to:

A. That Plaintiff makes a killer product.

B. That Plaintiff is unethical.

C. That Plaintiff is more interested in money than in the lives of human beings.

D. That Plaintiff and other manufacturers refused to participate in the program "Killer Wheels."

E. That if Plaintiff Redco Corporation does not recall all of its multi-piece rim product, it is unethical.

33.

The defamatory statements made by Defendants were exposed to millions of people in two unprivileged broadcasts of the program "Killer Wheels."

34.

Defendants knew that the statements and innuendoes were false and defamatory or in the alternative acted in reckless disregard of the truth for the reasons stated in Count I, supra.

35.

Defendants knew or should have known that said false and defamatory statements would harm the reputation of Plaintiff Redco Corporation by lowering it in the estimation of the community and by detering customers and other persons from associating or dealing with it, causing a loss of customers, loss of sales, an increase in insurance premiums, and other detrimental results.

*Appendix A—Plaintiff's Complaint with Killer Wheels Transcript.*

36.

As a result of Defendants' false and defamatory statements and innuendoes Plaintiff has suffered a loss of reputation.

37.

As a result of Defendants' conduct, Plaintiff has suffered a loss in profits in excess of $10,000.00.

38.

As a result of Defendants' conduct, Plaintiff's insurance premiums were raised from $4.00 per $1,000.00 worth of coverage to $15.00 per $1,000.00 worth of coverage despite the fact that Plaintiff has the best safety record of all manufacturers of multi-piece rims.

39.

Products liability law suits against Plaintiff tripled as a result of the broadcast sensitizing Plaintiff to be the target of unfounded products liability suits.

40.

As a result of Defendants' conduct, Plaintiff has been exposed to bias and prejudice of the public which forms the jury pool in any products liability suit brought against Plaintiff.

41.

The conduct of Defendants was outrageous and Plaintiff is entitled to punitive damages.

WHEREFORE, Plaintiff Redco Corporation requests your Honorable Court to award compensatory damages in excess of $10,000.00 together with punitive damages, interest and costs of suit.

*Appendix A—Plaintiff's Complaint with Killer Wheels Transcript.*

COUNT III

INTENTIONAL INTERFERENCE WITH EXISTING AND PROSPECTIVE BUSINESS RELATION

42

All preceding and succeeding paragraphs are hereby incorporated by reference.

43.

Prior to March 8, 1981, Plaintiff had a business relationship with American Universal Insurance Company.

44.

Plaintiff's business relationship with American Universal Insurance Company involved a contract of products liability insurance whereby American Universal insured Plaintiff for products liability of its product, multi-piece rims.

45.

Prior to March 8, 1981, American Universal Insurance Company provided products liability coverage to Plaintiff at the rate of $4.00 per $1,000.00 of coverage.

46.

On March 8, 1981, Defendant CBS, Inc. after solicitation by Defendant IIHS broadcast a program titled "Killer Wheels" over nationwide television over the CBS television network.

47.

Said program was rebroadcast on September 6, 1981.

48.

After the publications of the misrepresentations included in the said broadcast "Killer Wheels" as set forth hereinabove, Plaintiff's business relationship with American Universal Insurance Company was altered dramatically.

49.

After the above-mentioned broadcast of "Killer Wheels", American Universal Insurance Company raised its rate for products liability insurance for Plaintiff's product from $4.00 per $1,000.00 worth of coverage to $15.00 per $1,000.00 worth of coverage.

50.

Although Plaintiff sought products liability insurance from other insurers, it was unable after Defendant CBS's broadcast of "Killer Wheels" to procure insurance on terms comparable to those it received prior to the broadcast.

51.

In addition, prior to March 8, 1981, Plaintiff enjoyed continuing business relationships with purchasers of its multi-piece rim line.

52.

Further, Plaintiff's reputation as a manufacturer of multi-piece rims prior to March 8, 1981, gave rise to a reasonable likelihood and probability that additional purchasers would consummate a business relationship with Plaintiff, and prior customers would make additional purchases of Plaintiff's product.

53.

After Defendant CBS's broadcasts of the program "Killer Wheels" on March 8, 1981, and September 6, 1981, Plaintiff suffered serious impairment of its business relationship with its existing and prospective customers.

54.

The loss in Plaintiff's sales relationships included, inter alia, and is demonstrated by Plaintiff's gross sales figures in its sales of multi-piece rims by comparing the year preceding and the year of Defendant CBS's broadcasts of "Killer Wheels" as follows:

A. In March of 1980 (1 year prior to the broadcast) Plaintiff's sales of multi-piece rims were in the amount of $358,694.74.

B. In April of 1980 Plaintiff's sales of multi-piece rims rose 46% to the figure of $523,717.91.

A and B, supra, demonstrate the sales relationships of Plaintiff with its customers prior to the broadcast.

C. In March of 1981 (the month of the first broadcast) Plaintiff's sales of multi-piece rims amounted to $336,629.37.

D. In April of 1981 (the month following the initial broadcast of "Killer Wheels") Plaintiff's sales dropped 35% to a total of $217,759.70.

These figures demonstrate the loss of sales relationships suffered by Plaintiff as a result of Defendant's broadcast.

55.

In September of 1980 (the year preceding Defendant CBS's broadcast) Plaintiff's sales of multi-piece rims totaled $380,096.51. In October of 1980 (again the year before the broadcast) Plaintiff's sales of multi-piece rims were up 19% to a total of $542,835.51.

56.

In September of 1981 (the month of the second broadcast of "Killer Wheels") total sales of Plaintiff were $484,511.44. In October of 1981 (the month following Defendant CBS's second broadcast) Plaintiff's sales were down to $234,708.95.

57.

Defendant CBS knew or in the exercise of due care should have known that the broadcast of its program "Killer Wheels" was substantially certain to result in preventing the formation of business relationships by Plaintiff in both sales and insurance and/or in damaging the existing business relations of Plaintiff.

58.

Defendant IIHS solicited the publicity provided by the program with the intent to damage the existing business relations of Plaintiff and to prevent the formation of new business relations by Plaintiff; in the alternative Defendant IIHS knew that damage to Plaintiff's existing and prospective business relationships was substantially certain to result from the publicity solicited.

*Appendix A—Plaintiff's Complaint with Killer Wheels Transcript.*

59.

Defendants' interference with Plaintiff's business relations as set forth was done without privilege.

60.

Defendant CBS's interference in Plaintiff's business relations by its broadcast of "Killer Wheels" was improper in that:

A. The information provided by said broadcast was based upon a lack of objective evidence.

B. The information provided by the said broadcast was biased and collected in an effort to achieve the pre-determined result of maligning multi-piece rims.

C. Although the data purported to be scientific, it, in fact, formed no technical basis for the conclusions presented in the broadcast.

D. The broadcast included the presentation of film prepared by Defendant IIHS which film involved the use of a severely altered multi-piece rim for the sole purpose of making the rim explode.

E. Defendant's broadcast by innuendo suggested that multi-piece rims spontaneously "fall out of place" when in fact this is not true of Plaintiff's product.

F. The said broadcast suggested that accidents involving multi-piece rims "often involve innocent bystanders" when Defendant knew or in the exercise of due care should have known that such was not true of Plaintiff's product.

G. Defendant's broadcast ignored the data which suggested that multi-piece rims are safe unless improperly serviced.

H. Defendant in its broadcast used a letter from Paul Hykes, a rim engineer which letter critiqued a type of multi-piece rim when Hykes told Defendant that he had recanted that opinion and had provided to Defendant full data to backup his revised opinion that multi-piece rims are safe.

I. Defendant extrapolated data regarding a single model of multi-piece rims to suggest by innuendo that all multi-piece rims, although designed differently, had the same problems, when Defendant knew or in the exercise of due care should have known that such was not true of Plaintiff's product.

J. Defendant in its broadcast used innuendo, overstatement, distorted analogy, and unwarranted assumption to malign Plaintiff's product and to interfere with Plaintiff's contractual relationships with its insurers and its existing and prospective customers.

K. Defendant by innuendo suggested that the multi-piece rim was more hazardous than the single piece rim when Defendant had done no studies on single piece rims and knew from information provided to it by a qualified engineer that multi-piece rims are as safe as single piece rims.

L. Defendant by innuendo labeled the manufacturers of multi-piece rims, including Plaintiff, unethical.

61.

Defendant IIHS likewise has intentionally and improperly interferred with Plaintiff's existing and prospective contractual relations, as follows:

A. With the express purpose of removing multi-piece rims from availability on the market, IIHS solicited publicity presented by Defendant CBS in its broadcast "Killer Wheels".

B. Defendant IIHS provided much of the unfair, slanted, improper information used by Defendant CBS in its program, including, inter alia, Defendant IIHS prepared the film used on the presentation "Killer Wheels" which purported to show the hazards of explosion of multi-piece rims when Defendant IIHS knew that such explosions could only be achieved by altering the product severely from its originally manufactured form in a fashion which does not occur under normal use.

C. Defendant IIHS by its agents, servants and employees presented testimony on Defendant CBS's program "Killer Wheels" which testimony Defendant knew or in the exercise of due care should have known had no factual basis.

D. Said testimony of Defendant IIHS included but is not limited to, the following:

(1) that multi-piece rims explode "like a shell out of a cannon into whatever is in the way which is *very often a serviceman's head*;

(2) that IIHS has reported deaths involving multi-piece rim explosions, "but we are reporting what's known, and we have *every reason to believe that what's known is just the tip of the iceberg* because no data are collected on these;

(3) that the accidents involving multi-piece rim explosions "often involve innocent bystanders."

E. Defendant IIHS presented to Defendant CBS anecdotal examples of multi-piece rim explosions for use to malign the product per se when Defendants knew or in the exercise of due care should have known that such incidents involved misuse or improper servicing of the said multi-piece rims.

F. Defendant IIHS publicized through Defendant CBS in the "Killer Wheels" program, its conclusion that multi-piece rims should not be available for sale when Defendant IIHS knew from its own in-house engineer that it had no sound technical basis to arrive at such conclusion.

G. Defendant by innuendo suggested that the multi-piece rim was more hazardous than the single piece rim, when Defendant had done no studies on single piece rims and knew from information provided to it by a qualified engineer that multi-piece rims are as safe as single piece rims.

H. Defendant by innuendo labelled the manufacturers of multi-piece rims, including Plaintiff, unethical.

62.

As a result of Defendants' interference with Plaintiff's contractual relationships both existing and prospective, Plaintiff has suffered pecuniary damages in excess of $10,000.00.

63.

In addition Plaintiff has suffered damage to its reputation.

64.

The conduct of Defendant has exposed Plaintiff to unfounded products liability lawsuits.

65.

Defendant's conduct has further exposed Plaintiff to bias and prejudice in the public which forms the jury pool in any products liability suit brought against Plaintiff.

66.

The conduct of Defendants was outrageous and Plaintiff is entitled to punitive damages.

WHEREFORE, Plaintiff Redco Corporation requests your Honorable Court to award compensatory damages in excess of $10,000.00, together with punitive damages, interest and the costs of suit.

*Appendix A—Plaintiff's Complaint with Killer Wheels Transcript.*

COUNT IV

CONSPIRACY

67.

All preceding and succeeding paragraphs are hereby incorporated by reference.

68.

Defendants IIHS and CBS by their agents, servants and employees, with the intent to injure Plaintiff colluded, agreed and conspired to prepare, edit and broadcast the program "Killer Wheels" in an unlawful fashion.

69.

Defendants CBS and IIHS agreed to present the broadcast "Killer Wheels" for the object of effecting the unavailability of multi-piece rims in the American market.

70.

Defendants by their agents, servants and employees met on more than one occasion for the purposes of discussing the preparation of this biased and unfair program.

71.

Defendant IIHS provided to Defendant CBS the unfair demonstration film which was used in the broadcast of "Killer Wheels."

72.

As a result of Defendants' conduct, Plaintiff has suffered a loss of reputation.

73.

As a result of Defendants' conduct, Plaintiff has suffered a loss in profits in excess of $10,000.00.

74.

As a result of Defendants' conduct, Plaintiff's insurance premiums were raised from $4.00 per $1,000.00 worth of coverage to $15.00 per $1,000.00 worth of coverage despite the fact that Plaintiff has the best safety record of all manufacturers of multi-piece rims.

75.

Products liability law suits against Plaintiff tripled as a result of the broadcast sensitizing Plaintiff to be the target of unfounded products liability suits.

76.

As a result of Defendants' conduct, Plaintiff has been exposed to bias and prejudice of the public which forms the jury pool in any products liability suit brought against Plaintiff.

77.

The conduct of Defendants was outrageous and Plaintiff is entitled to punitive damages.

WHEREFORE, Plaintiff Redco Corporation requests your Honorable Court to award compensatory damages in excess of $10,000.00 together with punitive damages, interest and costs of suit.

Respectfully submitted,

LAUCKS & MONROE

By: _____
Donald L. Reihart

By: _____
Lillian M. Morgan

By: _____
Sharon E. Myers

*Appendix A—Plaintiff's Complaint with Killer Wheels Transcript.*

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF YORK } SS.

Before me, the undersigned officer, personally appeared J. B. SECHRIST, who acknowledged himself to be the Vice President of Redco Corporation, and he is authorized to make this Affidavit on its behalf and that the facts contained in the foregoing Complaint are true and correct to the best of his information, knowledge and belief.

/s/ J. B. SECHRIST
J. B. Sechrist

Sworn and subscribed to before me
this 3rd day of March, 1982.
Susan M. Anderson, Notary Public
York, York County, Pa.
My Commission Expires March 19, 1985.

*Appendix A—Plaintiff's Complaint with Killer Wheels Transcript.*

60 MINUTES

Volume XIII, Number 25

as broadcast over the

CBS TELEVISION NETWORK

Sunday, March 8, 1981

7:00 - 8:00 PM, EST

With CBS News Correspondents
Mike Wallace, Morley Safer, Dan Rather
and Harry Reasoner

"KILLER WHEELS" — Produced by
Allan Maraynes

"ROBERTA GOES TO CHINA" — Produced by
Igor Oganesoff

"CRIB DEATH" — Produced by
Jim Jackson

PRODUCED BY CBS NEWS

Copywright—MCMLXXXI CBS Inc.
ALL RIGHTS RESERVED

*Appendix A—Plaintiff's Complaint with Killer Wheels Transcript.*

MIKE WALLACE: This test film by the Insurance Institute for Highway Safety was made with a 250-pound dummy, but it shows graphically what can happen when a wheel rim explodes. (Sound of explosion) Unlike the tire on your automobile, which rests on a single-piece rim like this one, the tires on most of the trucks and buses on the road rest on a rim made of two or three pieces, like this one.

GARY GARDNER (lawyer): These things will kill you, if you don't have the required knowledge to assemble them.

• • • • •

(Roberta Peters singing)

DAN RATHER: During the years of the Cultural Revolution, the Chinese became closet musicians, teachers and opera singers, trying hard to preserve what they knew and remembered of Western opera.

ROBERTA PETERS: They have a hunger for Western music. I mean, they are starved to hear Western music.

(Roberta Peters singing "The Sound of Music")

• • • • •

HARRY REASONER: Derek Mahr was born on October 10th, 1980, in New York, a normal baby, healthy, large for his age. One night when the baby was six weeks old, his mother went to the crib to wake him after a four-hour nap. She found that the baby had died in the crib during those four hours.

*Appendix A—Plaintiff's Complaint with Killer Wheels Transcript.*

At Massachusetts General Hospital in Boston, efforts are being made to single out the high-risk babies. If the tests show a high risk, the parents are brought into the hospital, and usually a home-monitoring system is advised.

(Electronic sound)

• • • • •

WALLACE: I'm Mike Wallace.

MORLEY SAFER: I'm Morley Safer.

RATHER: I'm Dan Rather.

REASONER: I'm Harry Reasoner. Those stories and more tonight on 60 MINUTES.

(Announcements)

"KILLER WHEELS"

MIKE WALLACE: Killer wheels—that's what many truck drivers and tire mechanics are calling some wheel rims now riding on our highways. The wheel rim is that steel part on which a tire is mounted. But we're talking here not about the wheel rims on cars; instead, we're dealing only with the wheel rims on trucks and buses and some campers. They are called multi-piece wheel rims, and accidents involving them, according to U.S. government statistics, have killed more people than have died in accidents involving the Ford Pinto or the Firestone 500 tire.

So, it's no surprise that there has been a call to ban these wheel rims from the highways. That is part of our report. But this is also a story about the companies that

make these wheels, about decisions made by large corporations in weighing the costs and the benefits of selling potentially dangerous products. And in case you're wondering what an accident involving a truck rim is like, take a look at this.

(Natural sound from simulated car crash)

This test film by the Insurance Institute for Highway Safety was made with a 250-pound dummy, but it shows graphically what can happen when a wheel rim explodes.

(Sound of explosion)

Ben Kelley of the Insurance Institute explains how the accidents happen.

BEN KELLEY: Its design causes a piece of metal, weighing anywhere from 10 to 30 pounds, to be held on the outside of a tire that is under tremendous air pressure. And if that metal, for any reason, dislodges, it fires off like a shell out of a cannon into whatever is in the way, which is very often a serviceman's head.

WALLACE: Now that means that, unlike the tire on your automobile, which rests on a single-piece rim like this one, the tires on most of the trucks and buses on the road rest on a rim made of two or three pieces, like this one. One piece interlocks with the other. And when the tube in the tire is inflated, tension is built up between the two pieces. It's when those two pieces fall out of place that the pressure can cause them to separate, to explode.

Just last year, at this service station in Clayton, Georgia, three young men stopped to put air in a truck tire. Lloyd James, Sr., the father of one of them, told us what happened next.

*Appendix A—Plaintiff's Complaint with Killer Wheels Transcript.*

LLOYD JAMES, SR.: The next thing I knew, I have a telephone call at home, said there was a bad accident here at the station. And we found out that the tire and wheel had exploded and hit my son in the face and the nose part. It separated his head here.

WALLACE: His son, 23-year-old Spud James, had been married just two months when he suffered permanent brain damage after a chunk of steel from a multi-piece rim exploded into his head. He can no longer speak and he is paralyzed on one side of his body.

It was difficult for us to imagine the kind of force behind an exploding wheel rim, but this film, produced by Goodyear, one of the manufacturers of multi-piece rims, tells the tale.

NARRATOR (Goodyear film): The sheer power generated by an exploding tire-and-rim assembly is almost unbelievable. Did you know that a tire, inflated to 75 PSI, has the power in an explosive situation to hurl a 16-pound bowling ball a full half-mile? This is enough force to raise a 3,000-pound car 15 feet off the ground.

WALLACE: Goodyear made this training film to point up what can happen if multi-piece rims are not handled correctly.

NARRATOR (Goodyear film): Loosening any of the components before complete deflation may cause the assembly to come apart with explosive force, like a bomb. (Sound of explosion) And you see what can result from that.

WALLACE: Goodyear and the other manufacturers recognize the hazards connected with multi-piece rims during deflation or inflation of the tire; but they say accidents occur only when proper servicing procedures aren't followed, and they say accidents involving the rim are extremely rare. But Ben Kelley says that's not so, and he has so far reported to the federal government more than a hundred deaths and at least 400 injuries involving multi-piece rim explosions.

KELLEY: But we are reporting what's known, and we have every reason to believe that what's known is just the tip of the iceberg, because no data are collected on these.

WALLACE: And, says Kelley, the accidents often involve innocent bystanders. This test film shows what might happen when an unknowing vacationer tries to put air in the tire on his camper.

(Sound of explosion)

KELLEY: We know of the—what we call the "innocent bystander" accident—somebody walking by a service shop or walking by a parked truck and having one of these go. And we know of these so-called freak accidents—which aren't so freak, it turns out—in which the rim flew off and went into somebody's car and—and—and demolished the people inside.

Now, the—the irony is that there is a—an identical design in which all of the metal is combined—the single-piece wheel, in which it's all in one piece. There's nothing separate from the wheel.

WALLACE: Right.

KELLEY: And that can be used for almost every size of truck that operates over the road today.

WALLACE: Why, then, don't truck drivers prefer the single-piece to the multi-piece rim? Some say it's because it is much more difficult to mount and service the single-piece, and it is for that reason, say the manufacturers, that its entry onto the market has been slow. But back to multi-piece rims.

The tire makers insist that if multi-piece rims are inflated in a safety cage like this one, accidents will be prevented. But it turns out that a good number of accidents occur after the tire is inflated and out of the cage. That is how Mary Ehmann's son, Eric, was killed after his boss told him to repair a truck tire.

MARY EHMANN: He inflated it, took it out of the cage, rolled it across the floor to lay it down beside the truck, and when he laid it down, the impact (slaps hands) of hitting the floor—apparently something wasn't quite right, or maybe there was a piece of rust or something there—

WALLACE: Hm-mmm.

EHMANN: —it released the rim. And, of course, he was leaning over it. So the rim blew, just like a missile, and went through the top of his head and removed the frontal part of his skull. As people were coming to console us, they would say, "Oh, I remember that happened to So-and-So. I know somebody that—a child lost an arm or lost an eye." A man that worked over in my husband's office said a man in their town was decapitated by it. And before long, I had 10 to 15 people say they knew of this happening, and then I thought this is not the freak thing I thought it was.

WALLACE: It never crossed your mind to sue the garage owner or to sue Firestone or Goodyear people?

EHMANN: I did a lot of praying on it, of which way should I go. And remembering Eric the way he was—he was not vindictive, either—and I don't think he would have wanted me to.

WALLACE: But someone who did sue was this man, Clifford Griggs. He was hit in the face with a multi-piece rim and now suffers from traumatic epilepsy. His face was reconstructed with plastic surgery. The wheel on his truck exploded because parts from one rim were a mismatch with parts from another. And his lawyer, Gary Gardner, held Firestone, the manufacturer, responsible.

GARY GARDNER: They could very easily have stamped a warning on these pieces. Just say, "Do not handle. Danger." You know, "These things will kill you if you don't have the required knowledge to assemble them." Their obvious defense was, as they have tried to defend in all the cases, that when you stamp those things on the rim, you create stress points. And our engineer said that's poppycock. They didn't have any trouble stamping their name on it.

WALLACE: A jury awarded Clifford Griggs more than a quarter-million dollars, after Gardner contended that Firestone, the manufacturer of the rim, had a duty to print a warning on each rim telling users about the risks involved in assembling them. It's interesting to note that after the Griggs' decision, Firestone did consider putting warning labels on multi-piece rims. One internal memo says: "As interpreted by the government and the courts, we do have a duty to warn." And goes on

to say, "We would not want to use the word 'kill', as this would have a negative reaction from our customers." Firestone and Goodyear even went so far as to write sample warnings, but they didn't use them.

GARDNER: If they put a warning on now—they know that they have got millions of these rims out in the pub—public's hand right now—they are either going to have to recall those immediately, which will cost them a substantial sum of money, and they know it, or the lawyers are going to be able to show that now you put the warning on the new ones, why didn't you recall the old ones? Why didn't you get on television and tell the public, don't handle these rims unless you're trained to do so? Because that would cost them money, that's why they won't do it.

WALLACE: There are four major manufacturers of multi-piece rims: Firestone, Goodyear, the Budd Company, and the Kelsey-Hayes Corporation. We asked them to respond to our questions for this broadcast, but for various reasons, including their involvement in numerous lawsuits over multi-piece-rim accidents, they declined.

Firestone, however, did tell us that accidents involving multi-piece rims are so rare that they don't merit this kind of attention.

As we mentioned earlier, the manufacturers insist the multi-piece rim is no more hazardous than the single-piece. Still, NHTSA, the National Highway Traffic Safety Administration, is now considering a proposal that they be banned from the highways. And there are some multi-piece rims considered so hazardous by the

government that NHTSA has asked the manufacturers voluntarily to recall them, but they have refused. One such rim is the RH5-degree rim made by Firestone, the Budd Company, and Kelsey-Hayes. It is no longer in production, but there are millions of them still on the road. One former executive did agree to talk to us about the RH5 that his company made. Jack Bradley, former head of the Wheel Engineering Division of the Budd Company.

Mr. Bradley, are multi-piece rims dangerous?

JACK BRADLEY: Not—absolutely not.

WALLACE: Not dangerous?

BRADLEY: They are not dangerous.

WALLACE: No more dangerous than the so-called single-piece rim?

BRADLEY: Not at all. The single-piece rim and—and the—and the multi-piece rims are both safe rims. And the incidence of problems with one or the other is not significantly different. But to my knowledge, it's always been a case of—of poor maintenance or the—the people got careless.

WALLACE: So, the Budd people were, by and large, pretty satisfied that the multi-piece rim, particularly the RH5, was a safe product?

BRADLEY: Yes.

WALLACE: I then read Bradley a letter from Budd's former chief engineer, a man named Paul Hykes, who wrote about the RH5 after he left the Budd Company.

He says in a letter: "It is more subject to dangerous wear than other designs. The only time that this dangerous wear can be detected is when the rim is dismantled." He says: "The RH5 can be put together improperly and subsequently blown apart when new. From the foregoing, you can readily understand why I ask the question, 'Why has this rim not been removed from the market?' " Now this was your boss back in 1969, Paul Hykes, chief engineer of the Budd Company, suggesting the rim should be taken off the market.

BRADLEY: Then as—as close as I was to Paul, I never realized that he had these feelings about the RH5-degree rim.

WALLACE: You didn't know that he and others had those feelings about the RH5 rim?

BRADLEY: I haven't—I've—I—I—I—I knew—I-I'm—I swear that I did not know while Paul was at the Budd Company that he objected to the RH5-degree rim.

WALLACE: But if Bradley didn't know about Hykes' feelings while the former chief engineer was with the company, nonetheless Bradley did consider the effects of such criticism. I read back to him a memo he himself had written about the Hykes letter.

(Reading memo): "I'm certain we will be asked in the near future to comment on Mr. Hykes' letter. Any publicity along this line could be very detrimental to the Budd image, particularly with the interest that the Department of Transportation has on safety at this time."

BRADLEY: What—what did I say? I said I didn't want a lot of publicity. Naturally. Who would?

WALLACE: Bradley still insisted the multi-piece rim was no more hazardous than the single-piece rim. But we had learned of an industry memorandum that said Bradley might have been pressured into changing his presentation at Department of Transportation hearings back in 1970, a presentation that would have shown that some multi-piece rims could not pass certain safety tests, and that the industry might be better off moving to the single-piece rim.

(Bradley laughs softly)

You smile, but isn't it a fact that what you were going to say at those Department of Transportation hearings was that multi-piece rims would not pass the sudden-deflation test at 60 miles per hour and that the industry should go to the single-piece rim?

BRADLEY: Yes, I had planned that.

WALLACE: Why?

BRADLEY: I—I—I—I said that I—I had—I showed my presentation to one of our very good customers, and—

WALLACE: Who?

BRADLEY: (Laughs) It was the Ford Motor Company.

WALLACE: Yes?

BRADLEY: And they suggested that I—that—and they only suggested, they didn't tell me, they just suggested if I took out two of the slides, my presentation would not be basically changed and it would make it—it wouldn't—it wouldn't be quite as damaging to the—to the industry. Not—not because the single-piece is basically safer than the multi-piece.

WALLACE: Then why?

BRADLEY: Because we—it was one way of—of taking some of the pressure of off us from—from—from the government. And—and from our standpoint—

WALLACE: What kind of pressure? Why was the—

BRADLEY: All—all of the things you're saying there.

WALLACE: That the RH5 or the multi-piece was less safe than the single-piece?

BRADLEY: That's what they were saying.

WALLACE: It turns out that these were not the only doubts the industry was having about multi-piece rims. There is this report written by two engineers at Goodyear's Motor Wheel Division: "The parts are inherently dangerous, both on the highway and in the shop." It says: "When in use, the dangerous condition is often masked." And it goes on: "Any positive action to get parts out of use will probably result in more liability suits and higher damage awards. But at the same time, it should reduce the number of accidents."

But the question remains: If multi-piece wheel rims are so dangerous, why hasn't the U.S. government ordered them off the road? Well, it turns out that the government's hands may be tied, for although the government is looking into a ruling that would ban future production of all multi-piece rims, the federal statute of limitations forbids the mandatory recall of most of the RH5 wheel rims, because they were manufactured so long ago.

Therefore, the responsibility would seem to fall upon the manufacturers.

JOAN CLAYBROOK: Absolutely.

WALLACE: Joan Claybrook, former head of the National Highway Traffic Safety Administration.

CLAYBROOK: It falls upon the manufacturers. And you haven't asked me if I were the manufacturer would I recall this, and I think that the answer is that it's the only ethical thing for the manufacturer to do.

WALLACE: Why do you think they refused?

CLAYBROOK: If they were to anow—acknowledge a defect by recalling this wheel, then that would be used against them in those product-liability cases. And it is, in most cases such as this, a financial decision by the manufacturer.

WALLACE: So, it comes down to money versus human life?

CLAYBROOK: There's no question about that. It comes down to that in the manufacture of cars today. Cars are not manufactured as safely as they can be, and the answer is money. That is the reason why not, and even though it's pennies in many cases.

WALLACE: Do you think it would be a good idea now to recall, for instance, the RH5's that are still on the road?

BRADLEY: I—I see—I really don't see any—any point in recalling those versus any other, like—as I pointed out before. They were the safest part we ever made, on—on a statistical basis.

WALLACE: And the accidents that have happened, you simply have to buy as part of the—part of the bargain, in a—in a sense?

BRADLEY: This is the way life is.

(Announcements)

## APPENDIX B

**Request for Findings of Fact**

IN THE
UNITED STATES DISTRICT COURT
For the Middle District of Pennsylvania

---

REDCO CORPORATION,

*Plaintiff,*

v.

CBS, INC. and THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY,

*Defendants.*

---

Civil Action No. 82-0263.
Jury Trial Demanded.

---

*PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW*

Redco Corporation moves your Honorable Court to find the following facts and conclusions of law to be applicable in the above case:

1.

On March 8, 1981 and September 6, 1981, CBS broadcast a program segment on its 60 Minutes show titled "Killer Wheels".

2.

"Killer Wheels" referred to multi-piece rims and was of and concerning Redco Corporation.

*Appendix B—Request for Findings of Fact.*

3.

The 60 Minutes show is a news program produced by CBS news.

4.

At the beginning of the show a human being is shown walking to a tire and bending over it.

5.

The tire explodes violently, projecting a human like figure dressed like a man into the air.

6.

The display leads the average viewer to believe this is what happens in reality.

7.

A visual display of a multi-piece rim is followed by a voice that says "These things will kill you".

8.

A man then is displayed on the screen who finishes the preceding sentence by saying . . . if you don't have the required knowledge to assemble them. (This man is not identified to the viewer.)

9.

The opening sequence of the show states as a fact that multi-piece rims "kill".

10.

The program suggests that all multi-piece rims kill people.

*Appendix B—Request for Findings of Fact.*

11.

The program suggests the killing is caused by a defective design.

12.

All multi-piece rims are displayed by the program as being inherently, unpredictably and frequently lethal in design and use.

13.

The program implies that all single piece rims are safer than all multi-piece rims.

14.

No Redco rim consisting of its unique reverse 9° rim and base assembly ever killed anyone and single piece rims are not safer than multi-piece rims.

15.

The program suggests, as a matter of fact, that the manufacturers of multi-piece rims, including Redco, could reduce or eliminate the hazards of multi-piece rims, but refuse to do so because they:

(a) fear loss of business;

(b) fear that any concession would open the way for lawsuits;

(c) do not care about human suffering caused by their product.

16.

The program suggests that the manufacturers are not simply mistaken but they knowingly, callously and in their own self interest misrepresented the facts about devastating injury.

*Appendix B—Request for Findings of Fact.*

17.

The program demonstrates the culpability of all manufacturers in the face of alleged factual lethality of all multi-piece rims.

18.

The program is developed with an audio visual style that implies the mobility, knowledge and objectivity of CBS.

19.

The program "Killer Wheels" does not present multi-piece rims as matters of debate or opinion, but rather presents as matters of fact the lethality of multi-piece rims and the culpability of the manufacturers.

20.

The program "Killer Wheels" is composed of elicit emotional responses of fear of multi-piece wheels, pity for victims and anger toward the manufacturers.

21.

The program "Killer Wheels" works as rhetorical proof that casts the show as a drama involving innocent victims, friendly witnesses, an indignant but objective reporting (backed up by the resources of network information gatherers and a heartless industry representative with something to kill.

22.

The dramatic structure of the show works to make Bradley an industry spokesman as unsympathetic and unbelievable.

*Appendix B—Request for Findings of Fact.*

23.

Cutaways are used in the "Killer Wheels" show to make Jack Bradley appear as a fool or a liar by implying that he was answering one question when he in fact was answering another.

24.

The "Killer Wheels" program by implication, communicates the following messages:

(a) that all multi-piece rims kill people;

(b) that all multi-piece rims are inherently, unpredictably and frequently lethal in design and use;

(c) that single piece rims are a known safe alternative;

(d) that the manufacturers of rims know this to be the case;

(e) that the manufacturers could diminish or eliminate the hazards of multi-piece rims but refuse to do so because (1) they fear the loss of business, (2) they fear that any concession (as through hazard warnings) would open the way for lawsuits against them, (3) they fundamentally do not care about the human suffering caused or potentially caused by their product; and

(f) the manufacturers are not simply mistaken, but that they knowingly, callously and in their own self interest misrepresented the facts about devastating injury.

*Appendix B—Request for Findings of Fact.*

25.

The "Killer Wheels" program is produced as a drama involving innocent victims, friendly witnesses, indignant but objective reporting of a heartless industry with something to hide. The entire focus has nothing to do with weighing the merits of multi-piece rims, but rather is about the culpability of all manufacturers in light of the lethality of all multi-piece rims.

26.

The program states that the manufacturers of multi-piece rims, including Redco, know that single piece wheels are safer than multi-piece wheels.

*CONCLUSIONS OF LAW*

1.

The program "Killer Wheels" is capable of being understood by the average viewer as defamatory.

In the Alternative

2.

A jury must decide the question of whether or not the program "Killer Wheels" is a defamatory broadcast.

Respectfully submitted,
LAUCKS & MONROE
By: DONALD L. REIHART
Donald L. Reihart
29 North Duke Street
York, Pennsylvania 17401
Tel: (717) 848-4900

*Appendix B—Request for Findings of Fact.*

*CERTIFICATE OF SERVICE*

I, Donald L. Reihart, Esquire, of the law firm of Laucks & Monroe, do hereby certify that service of the within document was made upon the following by depositing a true and correct copy of the same in the U.S. Mail, postage prepaid, addressed to the following:

Jerome J. Shestack, Esquire
Carl A. Solano, Esquire
Schnader, Harrison, Segal & Lewis
Suite 3600, 1600 Market Street
Philadelphia, Pennsylvania 19103
Attorneys for Defendant, CBS Inc.

G. Thomas Miller, Esquire
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P.O. Box 1166
Harrisburg, Pennsylvania 17108
Attorney for Defendant, CBS Inc.

James K. Thomas, II, Esquire
212 Locust Street
P.O. Box 999
Harrisburg, Pennsylvania 17108
Attorney for the Defendant, Insurance Institute for Highway Safety

LAUCKS & MONROE
By DONALD L. REIHART
Donald L. Reihart, Esquire

Dated: April 27, 1984.

## APPENDIX C

### Affidavit of Dr. Thomas W. Benson

IN THE
UNITED STATES DISTRICT COURT
For the Middle District of Pennsylvania

---

REDCO CORPORATION,

*Plaintiff,*

v.

CBS, INC. and THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY,

*Defendants.*

---

Civil Action No. 82-0263.

---

*AFFIDAVIT*

Thomas W. Benson, being duly sworn according to law, deposes and says:

My name is Thomas W. Benson. I have been a Professor of Speech Communication employed at the Pennsylvania State University since 1971 and a full professor since 1975. I have been teaching and writing about human communications since 1963 specifically in the analysis of human communication through speech, film, television and other media.

My area of academic discipline and research concerns communication studies and includes quantitative and qualitative analysis of communications. It also included public opinion analysis and response thereto.

*Appendix C—Affidavit of Dr. Thomas W. Benson.*

I am the editor and author of numerous books and articles about communication. I was awarded the Robert Kibler Memorial Award of the Speech Communication Association in 1983 as a pioneer in the rhetoric of film and television. See attached news release.

I have viewed the Killer Wheels broadcast by CBS, Inc. on March 8, 1981 and make the following affidavit concerning the communication portrayed in the program.

The average viewer understood as a person of reasonable intelligence and good will is induced by the Killer Wheels show to conclude:

1. That all multi-piece rims kill people;
2. That all multi-piece rims are inherently, unpredictably and frequently lethal in design and use;
3. That single piece rims are a known safe alternative;
4. That the manufacturers of rims know this to be the case;
5. That the manufacturers could diminish or eliminate the hazards of multi-piece rims but refuse to do so because (a) they fear the loss of business, (b) they fear that any concession (as through hazard warnings) would open the way for lawsuits against them and (c) they fundamentally do not care about the human suffering caused or potentially caused by their product; and
6. The manufacturers are not simply mistaken; but that they knowingly, callously and in their own self interest misrepresented the facts about devastating injury.

All of these matters are presented by the show as matters of fact (although some of them are repeated within the show as independently supported by

opinions). That is, they are reported as facts and as supported by facts and in addition, these "facts" are independently corroborated by opinions. They are not partly facts and partly opinions and, therefore, really just opinions. They are presented as facts.

Even the callousness of the industry is presented as a fact as when Mike Wallace asks at the end of the segment whether the industry is trading profits for lives. The respondent answers, "This is the way life is." The question and its answer are alleged by the show as a fact, and as representing a fact. Of course, without looking at the unedited footage, it is impossible to determine the accuracy of CBS' reported fact.

Furthermore, it is my opinion that although these matters are presented as matters of fact partly through the invocation of CBS and its 60 Minute stars as reporters of facts and partly through the use of constructive film editing, camera, and sound techniques, the medium of television itself is not inherently incapable of distinguishing between facts and opinions or arguments. Rather, CBS chose in this instance to present its Killer Wheels report as a statement of facts and a reasonable average viewer would, in my judgment, regard it as such.

THOMAS W. BENSON
THOMAS W. BENSON
*Professor of Speech Communication*

Sworn and subscribed to before me
this 29th day of February, 1984.
Constance M. Wheeler
Notary Public
University Park, Centre County, Pa.
My Commission Expires July 22, 1985.

*Appendix C—Affidavit of Dr. Thomas W. Benson.*

RELEASE

DATE: 30 NOVEMBER 1983

FROM: Dept. of Speech Communication, The Pennsylvania State Univ., 207 Sparks Building, University Park, PA 16802 (856-3461)

TO: All Media

At its annual convention in Washington, D.C., the Speech Communication Association presented the Robert Kibler Memorial Award to Thomas W. Benson, Professor of Speech Communication at the Pennsylvania State University.

The award cited Professor Benson for "dedication to excellence, commitment to the profession, concern for others, vision of what could be, acceptance of diversity, and forthrightness." In a speech of presentation at the award ceremony, Professor Emeritus Waldo Braden of Louisiana State University, speaking on behalf of the Association, said:

"For nearly twenty years, Thomas Benson has pioneered in the study of the rhetoric of nonverbal communication, television, and film. As a teacher and scholarly writer, he has educated students and peers concerning the rhetorical forces embedded in audio-visual images and in the fine arts generally. In the spirit of the late Robert J. Kibler, Benson dares to probe previously uncharted features of human communication while generously refining and forwarding the research of fellow scholars as

editor, writer, and film maker. Mysteries are challenges to his understanding and goads to his research. To the unraveling of such mysteries he brings a blend of rhetorical knowledge, artistic principles, familiarity with history, and originality of thought and expression."

Professor Benson came to Penn State University in 1971 after graduating from Hamilton College, earning the M.A. and Ph.D. from Cornell University, and teaching at the State University of New York at Buffalo and University of California, Berkeley. He edited the journal *Communication Quarterly,* has served two terms on the editorial board of *The Quarterly Journal of Speech,* and has written extensively on the rhetoric, art, and politics of speech, film, television, and nonverbal communication.

## APPENDIX D

### Affidavit of Dr. Thomas Benson

*AFFIDAVIT*

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF CENTRE } ss.

Before me, the undersigned officer, personally appeared THOMAS BENSON, who, being duly sworn according to law, deposes and says according to his personal knowledge that the following facts and opinions are true and correct to the best of his knowledge and belief:

I graduated from Hamilton College in 1958 and earned a BA Degree. In 1961 I graduated from Cornell University with an MA Degree and was awarded a PhD in speech and drama in 1966. I have taught at the State University of New York at Buffalo; at the University of California at Berkeley and am presently a professor of Speech Communication at the Pennsylvania State University at State College, Pennsylvania.

I have edited the journal "Communication Quarterly" and served two times on the editorial board of the Quarterly Journal of Speech. I have written extensively on the rhetoric, art and politics of speech, film, television and non-verbal communication. I have studied and taught the rhetoric of non-verbal communication, television and film communication for over twenty years. In addition, I have conducted research in the field of communication with a view of obtaining an understanding of communication by non-verbal, verbal, visual and auditory means.

*Appendix D— Affidavit of Dr. Thomas Benson.*

In November of 1983 I was awarded the Robert Kibler Memorial Award by the Speech Communication Association for the research and efforts that I have made in these fields.

My research, experience and understanding include seeking out and explaining the way in which communication occurs and how ideas are transmitted through various means of communication, including television and film.

I have published detailed analysis on the way television and film messages are constructed and communicated.

I have seen and reviewed the program "Killer Wheels" broadcast on March 8, 1981 by CBS, Inc. The following report supplements my Affidavit of February 29, 1984 that is incorporated by reference herein.

In coming to an understanding of the meaning of a television broadcast, the viewer relies upon the information presented and its context. In the case of "Killer Wheels", the context and the information are constructed by CBS to constitute a message communicating:

1. that all multi-piece rims kill people;

2. that all multi-piece rims are inherently, unpredictably, and frequently lethal in design and use;

3. that single piece rims are a known safe alternative;

4. that the manufacturers of rims know this to be the case;

5. that the manufacturers could diminish or eliminate the hazards of multi-piece rims but refuse to do so because (a) they fear the loss of business, (b) they fear that any concession (as through hazard warnings) would open the way for lawsuits against them and (c) they fundamentally do not care about the human suffering caused or potentially caused by their product; and

6. the manufacturers are not simply mistaken, but that they knowingly, callously, and in their own self interest misrepresented the facts about devastating injury.

Crucial to an understanding of how audiences respond to communication is the concept that interpretation is contextual rather than atomistic. This is not to say that audience interpretation is simply a matter of personal idiosyncracy or general impression, but that any element in a communication takes its meaning from the context in which it appears. In what follows, I will present as directly as possible the reasons for my judgments about the message of "Killer Wheels," and I will cite specific elements of the show that communicate the message, but I shall be doing so in an attempt to show how each element communicates in the context.

*That all multi-piece rims kill people.* This allegation of fact is presented in a number of ways, verbally and visually. The title of the segment, "Killer Wheels," not only makes the allegation but assumes it as a fact: *60 Minutes* is produced by CBS news, and advertised as such in the show and elsewhere. This carried the implication that the segment would not be titled as it is if it were not being reported, *named,* as a fact. Viewers are clearly invited to interpret the title of the segment in this way.

In the brief introductory sequence, the visual presentation begins before Mike Wallace's words. We see a human figure bending over a tire, which explodes. Only after we have been invited to think that we have seen a human being killed, the emotional effect of which is sustained throughout the rest of the segment, does Mike Wallace inform us that we have seen a dummy—and he then alleges that the sequence can be taken as a factual representation of what happens in reality:

> This test film by the Insurance Institute for Highway Safety was made with a 250-pound dummy, but it shows graphically what can happen when a wheel rim explodes. (We then see an explosion from another angle). . . . "Unlike the tire on your automobile, which rests on a single piece rim like this one, the tires on most of the trucks and buses on the road rest on a rim made of two or three pieces, like this one."

As Wallace finishes his second sentence, we see images of wheels and rims; while we are looking at a shot of a multi-piece rim, a voice says, "These things will kill you"—and only then does the visual image change to reveal a man in a blue suit, who finishes the sentence, with the words, "If you don't have the required knowledge to assemble them."

The effect of the sound-image editing here (in which the man who is identified here in the transcript, but only later in the broadcast accessible to the viewer, as Gary Gardner, a lawyer), is that Gardner's voice is placed in the same *commentative* role as Wallace's, and is let stand, not only by the omission of refutation, but by its editorial placement, as CBS's presentation of the facts—*these things will kill you.*

*Appendix D— Affidavit of Dr. Thomas Benson.*

The opening impression that a statement of fact has been made alleging that multi-piece rims kill is reinforced in a variety of ways throughout the show:

(1) Wallace says: "Killer Wheels—that's what many truck drivers and tire mechanics are calling some wheel rims now riding on our highways."

(2) Wallace says: "They are called multi-piece wheel rims, and accidents involving them, according to U.S. Government statistics, have killed more people than have died in accidents involving the Ford Pinto or the Firestone 500 Tire." (The allegation about U.S. Government statistics is clearly meant to establish that the wheel rims kill as a matter of fact. The fact of the number of deaths is not mentioned, but is used to create an impression of deadliness by a comparison whose other meanings I shall return to later.)

(3) Wallace says: "So it is no surprise that there has been a call to ban these wheel rims from the highways." The phrase "So it is no surprise" inserts an editorial opinion in the guise of a fact, linking the alleged "fact" that the rims are killers to the alleged "fact" that there is a call to ban the rims with CBS's implied approval of that connection.

(4) Mary Ehmann's son, Eric, was killed by the explosion of a multi-piece rim. And in an interview she reports hearing about other cases.

(5) In his concluding comment, Wallace reports eight (8) more deaths since his first report.

This review cites only those places in the program where multi-piece rims are alleged, as a matter of fact, to have killed (and the word "kill" is used at other points in

the broadcast, to bolster the impression). In addition, of course, the broadcast provides considerable detail on serious accidents and shows films in which dummies are destroyed by explosions. That multi-piece rims kill people is clearly meant to be reported as a matter of fact by "Killer Wheels."

Does "Killer Wheels" allege as a matter of fact that *all* multi-piece rims kill people? In my judgment, yes. At several points, the report groups together (1) all multi-piece rims, or (2) all manufacturers of multi-piece rims.

CBS clearly does not claim that each and every multi-piece rim has killed or will kill, but its mode of representation appears to communicate that all multi-piece rims have the same safety defects, so that a death caused by one represents a death that could have been caused by any, and that all manufacturers therefore fabricate "Killer Wheels." It appears to be like the case of three armed robbers in a bank, one of whom shoots the guard, but all of whom are guilty. The association of one multi-piece rim with all multi-piece rims, and of one manufacturer with all manufacturers, is made explicitly and implicitly in a number of places in the broadcast:

> ". . . The tires on most of the trucks and buses on the road rest on a rim made of two or three pieces, like this one. . .
> These things will kill you.
> . . . We're dealing with only the wheel rims on trucks and buses and some campers. They are called multi-piece wheel rims. . .
> . . . These wheel rims
> . . . The companies that make these wheels. . .

*Appendix D— Affidavit of Dr. Thomas Benson.*

. . . And in case you're wondering that an accident involving a truck rim is like. . .
. . . Its design. . .
. . . Unlike the tire on your automobile, which rests on a single piece rim like this one, the tires on most of the trucks and buses on the road rest on a rim made of two or three pieces, like this one. . .
. . . Goodyear, one of the manufacturers of multi-piece rims. . .
Goodyear and the other manufacturers recognize the hazards connected with multi-piece rims during deflation or inflation of the tire. . .
. . . It is for this reason, say the tires makers. . .
The tire makers insist. . .
There are four major manufacturers of multi-piece rims: Firestone, Goodyear, the Budd Company, and the Kelsey-Hayes Corporation (this implies that although there are four major manufacturers, there are other, "minor" manufacturers whose product does not materially differ).
. . . The manufacturers insist. . .
. . . It turns out that these were not the only doubts the industry was having about multi-piece rims. Since we first broadcast this report last March,
. . . 28 additional accidents, including eight (8) deaths, due to multi-piece rim explosions. Still, the Reagan administration has announced plans to drop a proposed rule that would ban all future production of multi-piece wheel rims. The reason? A conversion from multi-piece wheels rims to single piece would cost the industry upwards of $3,000,000.00 a year."

*Appendix D— Affidavit of Dr. Thomas Benson.*

From first to last, the CBS story treats the manufacturers as one industry and the multi-piece rim as one product—Whenever there are specific examples, they clearly are meant to represent the whole.

*All multi-piece rims are inherently, unpredictably, and frequently lethal in design and use.*

*Frequency:* This is measured impressionistically but with a tone of reportorial objectivity, in passages that compare the multi-piece rim with the Ford Pinto and Firestone 500; in reference to Ben Kelley's reported "tip of the iceberg" 100 deaths and "at least 400 injuries"; references to frequent injuries to innocent by-standers; and in the final reference to eight (8) deaths and twenty-eight (28) injuries since the first broadcast.

*Inherency:* Evidence is cited, and unsupported assertions are made, regarding the allegedly inherent danger of multi-piece rims. Because they are made of more than one piece, we are told repeatedly, multi-piece rims have an inherent tendency to explode.

*Unpredictability:* The unpredictable explosiveness of multi-piece rims is asserted visually in the several examples of explosions involving dummies, standing in for people who were or might be surprised by such accidents. The narratives of the reported accidents are handled in such a way, in terms of story-telling techniques, as to stress the surprise and unpredictability of the accidents. Lloyd James, Sr., is quoted saying, "The next thing I knew..." Mary Ehmann is quoted saying, "And when he laid it down, the impact (slaps hand) of hitting the floor—apparently something wasn't quite right, or maybe there was a piece of rust or something there—".

*That single piece rims are a known safe alternative.*

*Appendix D— Affidavit of Dr. Thomas Benson.*

At several places in the broadcast, (all) single rim wheels are alleged to be safer than (all) multi-piece rims. CBS quotes Ben Kelley at one point. Kelley says, "Now the—the irony is that there is a—an identical design in which all of the metal is combined—the single piece wheel, in which it's all in one piece. There's nothing separate from the wheel." Wallace confirms Kelley's remark as a CBS-certified fact by replying, "Right." Later, Wallace alleges that the only reason for not switching from multi-piece rims to single piece rims is the cost of a conversion—an allegation as to the fact of the safety and the fact of the manufacturers' motives.

*That the manufacturers know this to be the case.*

The industry is made to impeach itself in the excerpt from the Goodyear safety film (an apparent case of a reluctant witness, as CBS frames it). And in the interview with Jack Bradley, Wallace works to impeach Bradley and, despite Bradley's denials, remarks, as an apparent statement of fact, at the conclusion of part of the interview, "It turns out that these were not the only doubts the industry was having about multi-piece rims."

*That the manufacturers could diminish or eliminate the hazards of multi-piece rims but refuse to do so because (a) they fear the loss of business, (b) they fear that any concession (as through hazard warnings) would open the way for lawsuits against them, and (c) they fundamentally do not care about the human suffering caused or potentially caused by their product.*

Wallace alleges early in the segment that the story is about not simply the multi-piece wheel rim, but about corporate decisions and their motivations. At several places, CBS and the friendly witnesses whose remarks

are accepted as facts, repeat that the companies are motivated by profit, that they fear lawsuits, and that they are afraid to concede the facts for fear they would lose money. All of these allegations tend to establish the heartlessness of the corporations, a topic which is capped by the editing of the end of the Bradley interview, in which Bradley is made to smilingly accept the tradeoff of lives for money as "the way life is."

*That the manufacturers are not simply mistaken, but that they knowingly, callously, and in their own self interest misrepresented the facts about devastating injury.*

It appears to be important to the meaning of the show that it is not regarded as a debate about the merits of the multi-piece rim, but the factual report of a scandalous and knowing disregard of the public safety. This conclusion is implied to be a matter of fact growing out of the alleged facts that the manufacturers of multi-piece rims continued to manufacture them even though they knew them to be lethal and knew that there was a safe alternative. The entire focus of the show has to do, not with weighing the merits of the multi-piece rim, but about demonstrating the capability of (all) the manufacturers in the face of the allegedly factual lethality of (all) multi-piece rims.

So far, I have relied primarily upon the verbal portion of the broadcast to establish its probable meanings for an audience. I have tried to show how a series of statements, taken together, create a predictable message as fact. Assuming the widely advertised competence of CBS news, it is hard to see how a different reading could be expected or intended.

There is more to the context, of course, than the words spoken. The visual treatment of the material is designed to reinforce the impression that I have reported.

"Killer Wheels" is developed with an audio-visual style that strongly implies the mobility, knowledge, and objectivity of CBS. Interviews are cut in such a way, for example, that a single camera appears to be able to move instantaneously through time and space as it does in a fiction film. Documents are inserted in the midst of an interview. When Lloyd James's accident is reported, CBS goes to Clayton, Georgia to film the service station—creating an air of immediacy and implying a willingness to go to any lengths to report the actual facts. In the staging of the first explosion, the film (staged, we are told after it has begun, by the Insurance Institute for Highway Safety, and using a dummy) appears at first to show a man being blown apart: This is accomplished by a series of three shots:

(1) a man is shown bending over a wheel on the side of the highway;

(2) a truck passes down the highway, obscuring the screen;

(3) in what appears to be a continuation of shot #1, the tire explodes, hurling a figure into the air—then we are told that it is a dummy. Shot #2 is used to mask a cut to the new shot.

The use of a second shot to interrupt an ongoing shot is used in interview sequences, in what is called a cutaway, to cover the omission of part of the interview. From the point of view of my own analysis of the visual technique of "Killer Wheels," it is possible to describe the technique and its probable meanings to viewers. But

without looking at the outtakes, it is impossible to report with precision on whether CBS drastically misrepresented the sequence of events in interviews.

The matter of cutaways and the audio-visual style of television reporting perhaps needs some further elaboration. I understand that my analysis will have bearing on the question of libel, but I am writing from the point of view of an expert on communication and not on the law of libel.

The matter of the cutaway shot and its implications is a potentially complicated one. In news and documentary reporting, most scenes are filmed with one camera. That camera is focused during the major portion of the interview on the person being interviewed, and the continuous footage that results is called the master shot.

At the editing state, the master shot will be shortened, primarily for considerations of time, but also to retain only the portions of the interview that contribute to the story the reporter wishes to tell.

If the interview footage consists only of the master shot itself, its cutting would result in a "jump cut" each time a portion of the shot was discarded. A jump cut is created when a portion of the shot was removed, and the resulting edited cut reveals an obvious, even if minor, "jump" of the subject matter in the frame, resulting in an obvious and distracting discontinuity. To bridge such unconventional discontinuities, it is common practice to film "cutaway" shots that can be inserted into the gap in the master shot, hiding the discontinuity and acting as a bridge that preserves the illusion of continuous time in the interview.

*Appendix D— Affidavit of Dr. Thomas Benson.*

The most common cutaway shot in an interview is the "reverse" shot of the interviewer. Other cutaway shots might include a close-up of the interviewee's hands, or a long-shot of the room in which the interviewee and reporter are talking. Most interviews conducted outside the studio employ only one camera. Hence, any cutaway shots are usually filmed before or after the interview itself, and are not part of the moment in time that they are made to appear to be. And, of course, once the cutaway is accepted as a convention, it obscures the gap in the master shot, rather than revealing it.

It would perhaps be excessive to object to cutaways in news reporting generally. They are conventional, and they do contribute to the creation of an impression of reality. The cutaway can actually enhance communication by making an interview more interesting (by providing some visual relief); by avoiding the distracting discontinuities of a jump cut (thus enabling the viewer to pay closing attention to the edited content); by reminding the viewer of the presence of the interviewer who is revealed in the reverse-angle cutaway; by re-establishing the credibility and star-value of the reporter by cutting to him for a reverse angle in which he asks a question or guides our interpretation by the expression with which he listens to an answer. But the cutaway is also subject to abuse. All of the features that allow the cutaway shot to enhance the impression of reality (by re-constructing reality) can be used in such a way as to be unfair or, worse, to literally misrepresent the truth.

The cutaway shot is one clue as to the differential treatment accorded to people interviewed for "Killer Wheels." It is clear from the broadcast that Jack Bradley's interview is interrupted more frequently, and

with different materials, than the others. The effect is not only to undermine Bradley's credibility, but to alter the tenor of his answers and, quite possibly, to misrepresent the continuity of the logic of question and answer.

It is at this point that one must pause and comment on the use of the cutaway (and film technique in general) as a device for interpretation. As a matter of communication theory, and invoking a comparison between film and language, it would seem that if television and film can invoke the protection of the First Amendment, then they must also accept its responsibilities. That is, any medium of communication capable of invoking the protection of the First Amendment is claiming a certain status as communication, rather than simply claiming that it is totally irrelevant both to libel and the First Amendment. This follows from principles well established as matters of communication theory.

From the point of view of communication theory, it would be inaccurate to claim that television was, by its nature, either (1) purely factual and objective, or (2) merely a matter of opinion and interpretation, with no claim to make statements that are either accurate or inaccurate. Film (and television), like spoken and written language, is always interpretive, and therefore not perfectly objective.

But film and television, like language, are also capable, particularly when using language as one of their elements, of telling the truth and lying, of defending or defaming. One need not claim, that is, that all language is or ought to be "objective" to claim that language is

capable of telling the truth, or lying. The same holds for television, though there are important differences between spoken and written language and the "language" of television.

The techniques of television documentary and news narration are interpretive, but this does not vitiate their claims or their effect as broadcast news reporting. Part of the explicit and implicit message of *60 Minutes* is that it is taking enormous care to be accurate about the facts, that it is competent to identify and communicate the facts, and, in the case of "Killer Wheels," that the facts are essentially as set forth herein.

The issue of factuality needs to be addressed from another angle. From the point of view of communication theory and its relation both to decision-making and opinion-formation, the issues addressed by "Killer Wheels" would appear to be debatable. That is, by their nature, the questions of whether multi-piece rims are lethal, and whether the industry knowingly manufactures a lethal product, are capable of being addressed as matters of opinion and as debatable. And there is nothing about television, either as a medium or as a pattern of communicative practices, that prevents it from presenting these matters as debatable. But "Killer Wheels" does not present them as debatable or as opinion. Rather, "Killer Wheels" presents, as matters of fact, the lethality of multi-piece rims and the culpability of the manufacturers.

The issue of factuality versus opinion would seem to place the manufacturers in a particularly difficult position in trying to defend themselves, either in public or in court. Should it be understood that if a multi-piece

rim manufacturer provides evidence to indicate the safety of his product, he is implicitly conceding that the safety issue is simply a matter of debate (or of opinion) and that he therefore has conceded CBS's claim to be simply setting forth an opinion? From the point of view of communication theory, such a claim would seem to make any libel impossible to prosecute, since the Defendant would simply have to draw the Plaintiff into a debate about the merits of the original issue and then point out that the communication complained of is thereby conceded to be a matter of opinion. In my view, CBS clearly, and unnecessarily, claimed that it was presenting the facts.

I think it is also clear that in addition to is aura of factuality, CBS used the elements of television communication to encourage emotional responses to the material. For example, it appears to me that an average viewer is induced to experience fear, pity, and anger in quite predictable ways. Fear: The shots of the explosions, the shots of (potentially explosive) trucks travelling the highways, and others. Pity: The shots of accident victims and their relatives. Anger: The smiles of Jack Bradley—not only in the context of Mike Wallace's questions, but in the context of the shots which have aroused our fear and pity, and which are a part of *our* context, but were not a part of Bradley's context.

The emotional responses encouraged by the CBS style in this case are not merely *results* of the factual case made out against multi-piece rim manufacturers, but work to reinforce it. The emotional structure of the show works as a form of rhetorical *proof* that casts the show as a drama involving innocent victims, friendly witnesses, an indignant but objective reporter (backed up

by the resources of a network of information gatherers), and a heartless industry representative with something to hide.

The dramatic structure of the show works to make Bradley seem not just unsympathetic, but unbelievable. Bradley's honesty is impugned with cutaways to documents that go by too fast for us to fully comprehend, and with other cutaways that may bridge distorting gaps in the continuity of the question-and-answer sequence. But in addition to these means of undermining Bradley's testimony, other suggestions are made structurally. If Bradley is unsympathetic to the victims of multi-piece rim accidents, that would appear to testify to the industry's callous disregard of the public safety. And when Bradley makes an engineer's answer to the question of whether multi-piece rims are dangerous (he says, "They are not dangerous"), any audience member who has seen the demonstration films and the mutilated victims and the grieving parents must take Bradley for a fool or a liar.

Every reasonable viewer must believe by this point in the broadcast that multi-piece rims are dangerous, and Bradley's answer (which is presumably addressed to the statistical and engineering aspect of the question) is edited into the show so as to seem a denial of the human suffering that has been vividly and undeniably portrayed.

In my view, responsible news journalism would not thus structure a show to imply to an audience that a person was answering one question when he was in fact answering another. The techniques of interviewing and television narrative are employed in "Killer Wheels" in

such a way as to make Jack Bradley represent the industry, and to make him appear not only heartless but dishonest. He is the only witness whose story is cross-examined, his answers are clearly distorted in meaning by their placement in context, and it may be that editing has been used to put some of his answers directly out of context—a fact which cannot be verified without inspection of the pre-edited interview materials.

I am a communication scholar, not an engineer or lawyer. I do not know whether "Killer Wheels" is libelous, and I do not know whether multi-piece rims are safe. It is clear to me that CBS made out what it presents as a factual account of "killer wheels".

THOMAS W. BENSON
Thomas Benson

Sworn and subscribed to before me
this 25th day of (Illegible), 1984.

CONSTANCE M. WHEELER
Notary Public
University Park, Centre County, Pa.
My Commission Expires July 22, 1985

## APPENDIX E

### Affidavit of J. B. Sechrist

IN THE UNITED STATES DISTRICT COURT
for the Middle District of Pennsylvania

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Civil Action No. 82-0263

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REDCO CORPORATION,

*Plaintiff,*

v.

CBS, INC. and THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY,

*Defendants.*

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### AFFIDAVIT

My name is J. B. Sechrist. I am familiar with the information hereinafter referred to as emanating from files of The Insurance Institute of Highway Safety. I am familiar with the effect of the insurance institute's efforts to ban multi-piece wheels including the effect of the CBS show "Killer Wheels".

1.

On June 29, 1977, Lynn Smith of IIHS received information from the Bureau of Motor Carrier Safety suggesting that ... "very few accidents today are related to wheel failures". See Exhibit A.

*Appendix E—Affidavit of J. B. Sechrist.*

2.

The Insurance Institute for Highway Safety used a "clipping service" to obtain information about multi-piece rims and made no effort to collect information about single piece rims. See Exhibit B.

3.

By letter of November 24, 1977, the IIHS knew that drop-center type wheels (single piece) exploded through tire bead failure. See Exhibit C.

4.

By letter of Sept. 25, 1978, IIHS is shown to have knowledge that the North Dakota Workman's Compensation Research revealed forty *single piece rim accidents.* This information was ignored and suppressed by IIHS. See Exhibit D.

5.

By memo of June 30, 1978, IIHS had additional information suggesting that single piece wheels fail. See Exhibit E.

6.

By memo of July 17, 1978, IIHS had information suggesting that single piece and multi-piece wheels resulted in loss of control if a front tire went flat. See Exhibit F.

7.

By letter of September 12, 1978, the state of Texas reported there was no problem in two years with rim separation. See Exhibit G.

8.

The "test" film prepared by IIHS and broadcast on CBS program "Killer Wheels" violated OSHA standards passed on January 29, 1980. See Exhibit H.

9.

On January 29, 1980, OSHA also dispensed with requirement of warning labels on multi-piece rims. This information was known or should have been known by IIHS. See Exhibit I.

10.

On and before March 8, 1981, the IIHS knew or should have known of the South Coast Technology report. (See Exhibit C in Plaintiff's Appendix to Brief in Opposition to Motion for Summary Judgment), and the Phase III report of Failure Analysis Associates (See Exhibit B in Plaintiff's Appendix to Brief in Opposition to Motion for Summary Judgment), that set forth an authoritative study of multi-piece rim failures and acknowledged that single piece rims proportionally cause as many or more injuries and deaths as multi-piece rims.

11.

The efforts of IIHS and the CBS "Killer Wheels" program promoted the promulgation within the State Board of Education in Maryland of Cornor 13.A.06.07 that would eliminate the use of multi-piece rims on school buses and force the use of single piece rims with tube type tires. This rule was not adopted when all the safety evidence was presented. However, if it had been adopted. . . . The school children of Maryland would have been exposed to accident frequency twenty-five times higher than children in buses using multi-piece wheels.

12.

The Redco multi-piece rim is designed with a reverse nine (9°) degree locking ring and base assembly. This product has not killed any servicemen, innocent bystanders, truck drivers or other users.

13.

A summary attached hereto reflects accurately the information available to IIHS and their conduct in attempting to ban multi-piece rims. The exhibits, if not already in the record, are readily available to substantiate the summary. See Exhibit J.

J. B. SECHRIST
J. B. Sechrist II, Vice President
Redco Corporation

Sworn and subscribed to before me
this 26th day of April, 1984.

(Illegible)
Notary Public
(Illegible)

*Appendix E—Affidavit of J. B. Sechrist.*

## EXHIBIT J

## SUMMARY AND COMPILATION OF DOCUMENTS EVIDENCING THE UNTRUSTWORTHINESS AND INACCURACY OF INSURANCE INSTITUTE FOR HIGHWAY SAFETY STATEMENTS ON MULTI-PIECE RIMS

The Insurance Institute for Highway Safety, working in concert with plaintiffs' attorneys, has been the principal source of public statements attacking the safety of multi-piece rims. It has been by far and away the leading overt instigator of government action against multi-piece rims. Unfortunately, the Insurance Institute has misled and actively deceived the National Highway Traffic Safety Administration (NHTSA) about multi-piece rim safety, making public statements to the NHTSA about multi-piece rim hazards which were contradicted by its own non-public records and the expressed views of its own technical staff. What is more, the data which the Institute supplied to the NHTSA was full of errors and wholly unreliable. The Insurance Institute now has filed the same false and misleading information with the Maryland Board of Education. Thus, it has provided the Board of Education staff the same petitions to ban and recall multi-piece rims which it filed with the NHTSA in 1978 and the numerous follow-on filings it made with that Agency.

Fortunately, the NHTSA was able to pierce the Insurance Institute misrepresentations and inaccuracies. It has rejected the Insurance Institute petition for a rule banning multi-piece rims (47 Fed. Reg. 8232, February 25, 1982), and it regarded the companion petition for a defect investigation to recall multi-piece rims as so poorly based that it declined to open a formal investigation.

*Appendix E—Affidavit of J. B. Sechrist.*

It is essential that the Maryland Board of Education also not be misled and that it, too, see the active misrepresentation engaged in by the Insurance Institute.

1. *Misrepresentations by the Insurance Institute:* The Insurance Institute misled the NHTSA both by active misrepresentations and by materially misleading omissions in the information it filed with the NHTSA. For example, seven months before the Institute's first Petition to the NHTSA on June 14, 1978, it corresponded with Dr. Alan Milner, a metallurgist who owned a service garage and held himself out as an expert in tire mounting accidents, to secure consulting services on rim disengagements. Dr. Milner wrote back on November 24, 1977, stating:

> Thank you for your letter of November 8, 1977 inquiring about my background in multi-component truck wheel explosions.
>
> I do have some experience with multi-component rim separation explosions, although most of my experience concerns tire bead failure related explosions in drop center [single piece] type wheels.
>
> I have investigated accidents involving post mounting separations on continuous base, continuous side ring type wheels [multi-piece] of the Firestone type. These have been plaintiffs' cases which have involved fairly gross malpractice on behalf of the tire mounting operator in terms of failure to properly inspect and clean the rim components which were heavily rusted. See Exhibit A.

Dr. Milner thus told the Insurance Institute two things: (1) in his experience multi-piece rim disengagements resulted from "fairly gross malpractice" by tire mounting operators; and (2) in his experience the use of drop center type wheels such as the Insurance Institute and the Maryland Board of Education are advocating can result in explosive tire bead failures. The Insurance Institute's files do not reflect further correspondence with Dr. Milner. Importantly, the Insurance Institute materially misled the NHTSA, and now the State of Maryland as well, in the information it filed with the NHTSA by omitting any reference to or reflection of the information Dr. Milner furnished.

More significant is the fact that two weeks before the filing of the Institute's petition for a defect investigation, its own technical staff indicated in writing to the Institute's president that a recall of multi-piece rims was not warranted:

> I have reviewed three main sources of information for their technical content on multi-piece wheels: the Risjord files [a plaintiff's attorney], major wheel manufacturers' catalogues, and the Value Engineering Lab rim tests. *These sources, either separately or collectively, do not provide a sound technical basis for recalling any or all multi-piece rim designs from service.* (The emphasis, which appears in the copy of the document provided under subpoena, was added by hand at the Insurance Institute.) See Exhibit B.

This advice also was not mentioned in the Insurance Institute Petition to the NHTSA nor to the Maryland Board of Education staff.[1] This is noteworthy because it addresses and finds lacking as a basis for recall: (1) the only new data presented to NHTSA by the Insurance Institute (the accident records in the Risjord files); and (2) the only NHTSA consultant study dealing with the safety of multi-piece rims and relied upon by the Insurance Institute in its June 14, 1978 Petition (at page 4).

The Insurance Institute's public position that the educational and other shop requirements of the then pending and now effective OSHA standard for servicing multi-piece rims would not be effective in reducing accidents was also inconsistent with information in its internal files. The Insurance Institute knew, or had reason to know, from a document in its files that adoption of an appropriate OSHA standard would eliminate any hazards associated with multi-piece rims. That document is an Interoffice Memorandum of the Ford Motor Company dated December 12, 1974, obviously written without external motivation. The document states that:

> Fifteen incidents of wheel and side ring separation [Budd Duo Rims] of F250 and F350 vehicles were reported between February 18 and July 2, 1974.

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[1] On deposition in a subsequent court proceeding, the Institute's President, Dr. William Haddon, disingenuously sought to minimize the significance of this staff conclusion. Dr. Haddon attempted to dismiss it as based on a staff misunderstanding that the concept of defect did not include design defects. Haddon Deposition, *In Re: Multi-Piece Rim Products Liability Litigation*, M.D.L. Docket No. 362 (W.D. Mo. Nov. 20, 1981). The transparency of his efforts is clear from even a cursory review of the staff memorandum, which dealt *expressly* with whether there was a *design defect* in the rims. Notwithstanding Dr. Haddon's dissembling, the staff member knew that the issue was whether there was a design defect in the rims and concluded that the Insurance Institute's data did not support the conclusion that there was. See Exhibit B.

*Appendix E—Affidavit of J. B. Sechrist.*

Inspection of returned parts, twelve side rings and thirteen wheels, disclosed only a minor dimensional discrepancy on the wheels. Laboratory and vehicle tests conducted with wheels exhibiting this discrepancy proved retention to be satisfactory; *separation could only be duplicated by deliberate misassembly of the side ring to the wheel.*

*To preclude any occurrence of misassembly at first delivery, a process note was added to verify full side-ring to wheel gutter engagement; all assembly plants reported 100% compliance on 7-5-74. No further reports of this discrepancy have been received since 7-2-74.*

Since it has been demonstrated that wheel side ring separation occurs as a result of misassembly and the necessary precautions have been taken to assure proper assembly, the file is being closed and your concurrence is recommended. (Emphasis appears on the copy of the document provided by the Insurance Institute pursuant to a subpoena, indicating that its attention was clearly focused on this information.) See Exhibit C.

The Insurance Institute has engaged in numerous other misrepresentations and mischaracterizations in its petitions to the NHTSA. Thus, in its petitions to the NHTSA characterizing the "extent of the problem," the Insurance Institute refers to a Bureau of Motor Carrier Safety (BMCS) Report supposedly determining "that tire and wheel failures constitute the second largest cause of truck crashes." Petition, June 14, 1978, at 8; Petition, October 2, 1978, at 1. That is an obvious misstatement. The referenced BMCS Report does not even purport to

identify or compile statistics on rim separations.[2] Moreover, internal Insurance Institute documents show that in 1977 Bureau of Motor Carrier Safety personnel expressly advised the Institute's staff that ". . . very few accidents today are related to wheel failures." Insurance Institute Memorandum to File, dated June 29, 1977 (Exhibit D).

On at least two occasions, the Institute has misrepresented the problem of rim disengagement by including in its public allegations the discussion of a NHTSA multi-piece rim investigation which it characterized as being of "major concern." The investigation referred to did not have anything to do with multi-piece rim disengagement. The investigation related solely to wheels which suffered impact fractures due to overloading. See Insurance Institute Petition, June 14, 1978, at 2-3; and Insurance Institute Letter to the NHTSA, August 28, 1979.

The Insurance Institute submitted with its October 2, 1978 Petition a film showing an explosive disengagement of a multi-piece rim. The Institute said of its demonstration: "We deliberately modified the wheels to assure an explosion under pressure of tire inflation." The Institute failed to disclose to the NHTSA or the press what the words "deliberately modified" actually meant. In order to explode the filmed rim assembly, the Institute was compelled to machine away the rim's retaining hook which makes the particular multi-piece rim lock. If the Insurance Institute had disclosed that fact, it doubtless would have to disclose that when a

[2] This same falsehood was reiterated by Ben Kelly, an Insurance Institute Senior Vice President, in a December 1980 speech at Johns Hopkins University.

multi-piece rim is properly assembled, it cannot be made to fail except by conduct so unreasonable as to constitute gross negligence. Whatever publicity value this film may have, it has nothing to do with the safety of a properly assembled multi-piece rim.

The Insurance Institute also misled the Agency in another way. It cloaked itself in purported expertise, invoking the results of its "research" and "testing" to make seemingly authoritative statements about the design of multi-piece truck rims and the comparative design and performance superiority of single piece rims. Yet, in truth, the Insurance Institute had no real expertise in the field, did no independent research, did no testing, and did no study of single piece rim technology or accident data. Its conclusions lacked any legitimate basis for belief, much less authoritative status.

The head of the Insurance Institute's multi-piece rim "investigation" was John Arminio. In sworn deposition in *Fiscus v. Gay Johnson, Inc.*, C.A. No. C-82810 (Denver Dist. Ct., Colo. Sept. 4, 1980), Mr. Arminio revealed the total lack of expertise which the Insurance Institute brought to its investigation, and the incredible methodological deficiencies in that investigation.

Mr. Arminio, for example, had no education or experience in engineering, accident investigation, wheel maintenance and servicing, or highway safety generally when he arrived at the Insurance Institute in September, 1977, fresh from law school. (Dep. Tr. at 13-15.) Within six months he had been put in charge of the Insurance Institute's multi-piece rim investigation.

Mr. Arminio admitted that he "never personally investigated an accident" of multi-piece rim separation, that *all* the information he had concerning such accidents was hearsay, and that neither he, nor to his knowledge, *any* member of the Insurance Institute staff, investigated *any* of the multi-piece rim incidents alleged in any of the principal hearsay sources they relied on. Arminio stated he thought he *once* had examined a rim which had been involved in an incident. (Dep. Tr. at 38-47, 90, 94-95.) Arminio had *never* assembled any kind of multi-piece rim. What is more, *no one at the Institute investigated or knew anything about single piece rims.* (Dep. Tr. at 100-05, 173.) Yet, the only engineering experts which the Insurance Institute retained were brought in to deliberately cause a phony rim separation accident so it could be filmed for publicity purposes—that was the only "testing" in its entire investigation. (See Dep. Tr. 152-53.)

Thus, when the Insurance Institute described its investigation in court papers as late as 1981, it had to admit that it still "has no firsthand knowledge of accidents involving multi-piece rims" and that all of the information it had furnished NHTSA was "multiple hearsay." The Insurance Institute has even argued in court that any government report based on data which the Insurance Institute had supplied would not be admissible as evidence for this reason. "Suggestions of the Insurance Institute for Highway Safety in Opposition to Firestone's Request for Depositions," pp. 8-9, *In Re: Multi-Piece Rim Products Liability Litigation*, M.D.L. Docket No. 362 (W.D. Mo. dated July 29, 1981).

*Appendix E—Affidavit of J. B. Sechrist.*

The Insurance Institute misrepresentations did not stop with the filing of their petitions with the NHTSA. After the NHTSA rejected the proposed rule banning multi-piece rims, relying in part on the OSHA rim servicing standard and the availability of OSHA safety charts, the Insurance Institute wrote the NHTSA objecting that "apparently the rim matching charts and safety charts put out jointly by NHTSA and OSHA are out of print and unavailable in quantity from any government source." That assertion was inaccurate and misleading.

The safety and matching charts referenced by the Insurance Institute are available free of charge both from the NHTSA and from OSHA. They also may be ordered in bulk quantities through the Government Printing Office (GPO). The GPO periodically reprints the posters as the quantitites in stock are depleted. The last reprinting by GPO was in the Spring of 1982, when 50,000 of the charts were printed. The charts are not and will not be "unavailable," because the quantity in stock is monitored by Richard F. Sauger of OSHA's Office of Safety Standards. He authorizes the printing of new charts by GPO as they are needed. Mr. Sauger has informed Ms. Michele Fields, an Attorney at the Insurance Institute, of the continued availability of the charts.

The Insurance Institute, through public misstatements of its officials, has sought to create the impression that the federal OSHA workplace standard for servicing multi-piece rims cannot be effective in reducing rim accidents. Thus, in a 1980 speech at Johns Hopkins University, Ben Kelley of the Insurance Institute

asserted that there is no data suggesting that the similar California standard has reduced accidents. That was a false statement. California Department of Industrial Relations data reported to the NHTSA by Failure Analysis Associates and available to Mr. Kelley showed there were *no fatal accidents* involving multi-piece rims in that state since 1975, clearly evidencing the effectiveness of the Cal-OSHA rim servicing standard.

Mr. Kelley not only is capable of false statements about rim safety, he is capable of malicious gossip. In his speech at Johns Hopkins he told the story that some plaintiffs' lawyers were asserting that past investigations by the NHTSA of multi-piece rims were squelched by political payoffs. He will not be able to tell that story again. The Inspector General of the Department of Transportation found there was no basis for the allegation, and a federal court in Kansas City, Missouri recently ruled there is absolutely no basis for that claim.

2. *Unreliable data from the Insurance Institute:* The Insurance Institute submitted accident lists to the NHTSA and to the Maryland Board of Education which are full of errors and unsubstantiated, biased, and irrelevant but misleading data. Exhibit E is the affidavit of Dr. H. Daniel Roth, a noted statistical methodologist, who has analyzed the Insurance Institute's submissions. His affidavit and conclusions reveal the inaccuracy and unreliability of that data. Moreover, by its own admission, the Insurance Institute compiled its lists from hearsay newspaper reports, unsupported representations of plaintiffs' lawyers, and state workmen's compensation reports.

The objectivity of the reports of plaintiffs' attorneys must be judged in light of the interest those attorneys have in trying to get the NHTSA to order a recall, promulgate a rule, or issue a report critical of multi-piece rims.

Aside from the inherent unreliability of a skeletal report of an accident by a plaintiff's attorney seeking help to advance his client's case, there is the consideration in this case that one plaintiff's attorney, Mr. John Risjord, sought, apparently successfully, to manipulate the Insurance Institute to influence the views of senior NHTSA officials for the purpose of *creating* a government document condemning the product he is attacking in several private lawsuits. This is apparent from a July 17, 1978 memorandum which the Legal Assistant to the Insurance Institute's General Counsel sent to the Insurance Institute's President:

> "SUBJECT: Telephone Discussion with
> John Risjord Concerning
> Multi-Piece Wheels
>
> On Friday, July 14, 1978, I discussed with John Risjord several areas of concern regarding multi-piece wheels.
>
> (1) Pictures and Film—NHTSA has already requested the "blood and guts" pictures Risjord has. He said that he will provide us with a copy of these photos once they are returned by NHTSA. He does not want them publicly distributed at the present time until he has the opportunity to obtain permission from his clients.

(2) Risjord feels that there exists a definite need for someone with access to Joan Claybrook to make her personally aware of multi-piece wheels. He feels that she is isolated and does not have full information on the extent of the problem. Risjord offered his assistance and will fly in from Kansas City to attend a meeting with Claybrook, if necessary.

(3) Risjord has been in contact weekly with Roman Brooks of NHTSA [A NHTSA investigator whose views were rejected in ODI 150 and 215]. Brooks is in the process of drafting a recommendation that an investigation be opened. However, Brooks has expressed his concern that his recommendations will be buried unless Claybrook becomes aware of the problem. Brooks reports to Howard Dugoff, Lynn Bradford and Frank Berndt.

(4) Brooks has expressed his opinion of the reasons for NHTSA's past failures to act on multi-piece wheels. (Risjord had requested that these statements not be public.) Brooks said that in the 150 and 215 investigations there existed no public pressure supporting a recall—it was NHTSA against the manufacturers. In other words, NHTSA backed down. Brooks also feels that it is necessary to keep the pressure on and was pleased that the Institute has acted."

This was not the only instance of Risjord's efforts to use the Insurance Institute for his private litigation purposes. There were numerous contacts between Risjord and the Insurance Institute over the months leading up to the filing of the Insurance Institute's petitions against multi-piece rims which were the immediate fruit of his labors. What is publicly known of these contacts is detailed in Exhibit F.

*Appendix E—Affidavit of J. B. Sechrist.*

Newspaper accounts of accidents emphasize newsworthiness rather than thoroughness or technical analysis, and have long been dismissed by the courts as having no evidentiary value. Reliance in newspaper reports is particularly misleading in this case because of the manner in which they were collected. In November, 1977, the Insurance Institute hired a newspaper clipping service to supply it with news articles about multi-piece wheel disengagements. It provided the clipping service "key" words or phrases to look for. The Insurance Institute proposed use by the clipping service of the following words and phrases: "multi-piece wheels," "truck wheels", "truck tire explosion", "truck wheel accident", "truck wheel repair accident", and "truck tire blow-out". See Exhibit G. As should be apparent, a clipping service reporting against this assigned list of phrases reported every tire failure and driver loss-of-control accident that was ever the subject of a news story, including tire failures and accidents wholly unrelated to multi-piece rims. Because the incidence of tire failures and driver loss-of-control accidents far exceeds the incidence of rim disengagements, most of the newspaper accounts reported to the Insurance Institute necessarily involved matters wholly unrelated to its Petitions.

In its June, 1978 Petition the Institute recognized this, stating: "Since January 1978, the Insitute has received 104 reports of tire and wheel failures resulting in crashes. *The extent of involvement of multi-piece wheel separation in such crashes is not clear*". (Emphasis added.) In spite of its acknowledgement that its newspaper compilation did not tell anything about the incidence of multi-piece rim separations, in its October,

1978 Petition, the Insurance Institute relied specifically on the results of its clipping service compilation to assert that a "hazardous condition" of sizable magnitude existed.

In the section of its October Petition entitled "Extent of Problem," the Institute asserts:

> Since January 1978, the Institute has reviewed selected newspaper accounts of truck collisions attributed to tire and wheel failure, and in this period alone has received 116 reports of crashes caused by such failures. Clearly, a hazardous condition exists; the danger of death and injury involves not only the driver of these larger vehicles and any passengers, but also other road users, pedestrians, and bystanders.

Such an assertion is not supported by the Insurance Institute's compendium of indiscriminate newspaper reports.

In addition to newspaper reports and plaintiffs' attorneys' claims, the Institute has relied on state workmen's compensation boards' reports for 92 of the accidents it submitted to the Agency. These cases are analyzed by Dr. Roth in Exhibit E and this analysis showing the total unreliability of the data will not be repeated here.

The inadequacy of the Insurance Institute's data was conceded by Ben Kelley, a Senior Vice President at the Insurance Institute, when he stated, in a December, 1980 speech at Johns Hopkins University that their review was "unscientific."

The information provided by the Insurance Institute is not only unscientific and insufficient to support the allegations of a safety hazard, but is further tainted by the Insurance Institute's own internal contradiction of much of the information.

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EXHIBIT C

MARYLAND STATE DEPARTMENT
OF EDUCATION

HEARING ON SCHOOL
BUS RIMS September 23, 1982

*OPENING REMARKS OF THE MARYLAND SCHOOL BUS CONTRACTORS ASSOCIATION, THE NATIONAL SCHOOL TRANSPORTATION ASSOCIATION, AND THE NATIONAL WHEEL & RIM ASSOCIATION*

In the Spring of 1981 Specification COMAR 13A.06.07 was promulgated by personnel within the Maryland State Board of Education mandating the use of single-piece rims (and thus, tubeless tires) on all new school buses. This was done for the purpose of eliminating the use of multi-piece rims (and thus, tube-type tires).

Multi-piece rims and tube-type tires have been used, almost without exception, on school buses in the State of Maryland for over 50 years. The statistical data available indicates that this technology during its half-century of use has not posed a significant risk of injury to school children or operators riding on or servicing these buses.

Why, then, in 1981, after a half a century of successful use, was COMAR 13A.06.07 promulgated to ban this technology? The timing of COMAR 13A.06.07 coincided with the CBS "60 Minutes" broadcast entitled "Killer Wheels", as well as with certain public statements made by a Washington, D.C. based group known as the Insurance Institute for Highway Safety. This leads to the assumption that the misinformation presented by these two sources was used as the basis for adopting the specification.

This committee should be aware of the fact that CBS, as well as the Insurance Institute for Highway Safety, are currently being sued in a federal court for libel, regarding the "60 Minutes" program and the Insurance Institute's public pronouncements on this matter. The suit alleges that both "60 Minutes" and the Insurance Institute made willfully false and misleading statements concerning the multi-piece rim, its use and technology.

We know that grossly misleading and inaccurate information was presented in both the "60 Minutes" program and by the Insurance Institute. Personnel within the Insurance Institute, when under oath in litigation depositions, have admitted that the Insurance Institute purposely withheld single-piece rim-tubeless tire accidents known to the Institute, when advocating a ban on multi-piece rims. The Institute has also admitted that it has never conducted a study to determine the number of accidents occurring from single-piece rim usage. We have submitted for your consideration, a compilation of documents and summary demonstrating the untrustworthiness and misleading nature of the Insurance Institute's statements.

*Appendix E—Affidavit of J. B. Sechrist.*

We also know that COMAR 13A.06.07 is wrong and potentially very dangerous. A review of the appropriate and complete facts, not before the personnel in the Department of Education when they originally promulgated this Specification, will convince you, we are sure, to repeal this ill-advised action.

The group before you here today is, perhaps without question, the most knowledgeable group of people in this country concerning the true facts regarding the use of either multi-piece or single-piece rims on school buses or any other vehicle. For example, here with us today is the President of the Maryland School Bus Contractors Association, himself a knowledgeable and experienced owner/operator of school buses in this state. The Contractors Association, furthermore, represents the vast majority of private owner/operators of school buses in this state, and comes here today equipped with the results of a recent survey just completed this week for the purposes of this committee. No one has a better understanding of multi-piece rim actual field operation and experience, than those members of the Maryland School Bus Contractors Association who are represented here today.

Also with us here today is the National School Transportation Association, which as most of you know, has been a vociferous advocate of safety in this country for a number of years. They have conducted, with the help of experts, the only known national survey of school bus rim risks and accidents, comparing multi-piece rims with single-piece rims. That survey is relatively recent and is probative. The results of that survey are directly contrary to the Specification passed here in Maryland. It shows that there is a significantly higher risk of injury

to a school child while riding or being in the presence of a school bus equipped with single-piece rims (and thus, tubeless tires), than with a multi-piece rim (and thus, a tube-type tire).

Also with us here today is the National Wheel & Rim Association, representing not only itself, but its Ad Hoc Rim Committee. This group is made up of the many small, independent, after-market distributors of both multi-piece and single-piece rims and wheels. It also represents five of the six domestic manufacturers of both multi-piece and single-piece rims in this country. If you think that this group speaks from some sort of biased point of view, consider the fact that it manufactures and sells both types of wheels and rims, not just one or the other.

In addition to President Edwards, there are two well known experts in this technology here with us today representing the group. The first, Dr. Gail McCarthy, will be speaking to you regarding the comparative technology and risks associated with the two types of rims, if any, under question here today. The next is Mr. Eugene Newman, a noted safety engineer, who, himself, is an expert in rim technology and safety procedures governing the two technologies under question. You will find both of these experts' testimony compelling, learned, and objective.

Throughout the presentation today, you will often hear mentioned or cited, the two recognized and leading treatises on the subject of multi-piece and single-piece rim risks, called the "Phase III" and "Phase IV" Reports. These reports have been recognized and

referenced by both the Federal Occupational Safety & Health Administration and the National Highway Traffic Safety Administration's contractor.

Both these reports, of obvious erudite expertise, reach a directly contrary result to COMAR 13A.06.07 and show why this Specification is potentially so dangerous.

In addition to the "Phase III" and "Phase IV" Studies, we are providing this committee with a copy of the rather exhaustive study conducted by Southcoast Technologies, Inc. in February of 1981 for the National Highway Traffic Safety Administration. While this study is primarily economic in nature, you will find it compelling reading regarding the risks associated with the use of single-piece rims vs. multi-piece rims. For example, at page 106 it states:

> "It would appear that there are substantial numbers of single piece accidents occurring in the field."

At page 94, after reviewing the available school bus data, the study concludes:

> "The tentative inferred conclusion might be that for this particular group of operators [school buses], the introduction of 100% single piece rim wheels might well result in a very large relative increase in failures."

In summary of what all of these treatises and experts found: COMAR 13A.06.07 banning multi-piece rims on school buses is a mistake and potentially very dangerous. The facts, in this case the true and unequivocal facts, show that what the COMAR Amendment of December, 1981 does is to force upon the school bus operator in this state an untested and untried

technology. This has apparently been done without any real study as to whether single-piece rims are, indeed, safer than the multi-piece technology which has been used for over 50 years. To continue the COMAR Amendment at this time would be inappropriate in the face of overwhelming evidence that it has increased the risk of injury to the school child.

You will now be hearing from the experts. One further point, however, before they present their views. The Maryland State Department of Education's review of multi-piece rims was not, by any means, the first review by a government agency of this technology. The Maryland Department of Education is, however, the *only* government agency which has ever banned multi-piece rims. In this respect, the Maryland Department of Education has acted contrary to the States of California, Utah, Michigan, Kentucky, and Massachusetts; as well as the Province of Ontario, Canada, after their review of the matter. More importantly, perhaps, COMAR 13A.06.07, banning multi-piece rims, acts directly contrary to the findings of the National Highway Traffic Safety Administration made once in 1974, after an exhaustive study of rim technology, and again in 1981, when rejecting the petitions of the Insurance Institute for Highway Safety, before the proceeding was even raised to the level of rulemaking.

Of paramount importance are the studies of the Occupational Safety & Health Administration, soon to be published, which reach the conclusion that a workplace standard governing single-piece rims is necessary because of the hazard posed by this rim technology. The

Occupational Safety & Health Administration has specifically found, after its own study, that due to the effectiveness of its 2-year old multi-piece rim servicing rules in reducing accidents in this area of technology, single-piece rims stand at a higher risk level than does multi-piece rim usage.

This is not the National Wheel & Rim Association or this group speaking, these are five states and the United States Federal Government speaking after exhaustive, detailed studies, and in the case of both federal agencies, with all of the Insurance Institute's data before it, and after *both* showings of the "60 Minutes" program. In *all* instances, the position that multi-piece rims should be banned has been rejected.

The true facts clearly indicate that COMAR 13A.06.07, instead of its intended purpose of lowering risks to the school child riding in a school bus, may give rise to a significant increase in that risk. It must be reversed swiftly and promptly. The school bus owner/operator must be given freedom of choice to choose the best rim technology to meet his particular safety demands. To do otherwise is to unreasonably foster upon our children an undue risk of injury. Our experts will now show you why this is true.

*Appendix E—Affidavit of J. B. Sechrist.*

MARYLAND STATE DEPARTMENT
OF EDUCATION

HEARING BEFORE THE SCHOOL
BUS RIM TASK FORCE September 23, 1982

TESTIMONY OF EUGENE L. NEWMAN, P.E.

I am here today on behalf of the National Wheel and Rim Association, representing the manufacturers of both single piece and multi-piece rims, the National School Transportation Association, representing approximately 3000 school bus fleets all across the United States, and the Maryland School Bus Contractors Association, representing the approximately 1100 Maryland School bus owner/operators. We oppose the present Board regulation requiring school buses to use single piece rims and tubeless tires.

*Background and Qualifications*

To help you evaluate my testimony that this rule is without foundation, misguided, and counter-productive, I would like to describe my background in workplace and bus and truck safety.

I am a professional engineer, registered in the District of Columbia and the State of California. I am a past President of the American Society of Safety Engineers, having served in that capacity during 1974 and 1975. Since 1975, I have been the representative of the American Society of Safety Engineers on the U.S. Department of Labor Business Research Advisory Council.

*Appendix E—Affidavit of J. B. Sechrist.*

I have been a Certified Safety Professional since 1970. I was a founding director of the Board of Certified Safety Professionals, and served in that capacity for three years. As a member of the Board of Directors, I helped establish examination and certification requirements for safety professionals, and supervised the examination and certification process.

For over ten years, I was a member of the National Safety Council Industrial Conference, an operating conference which establishes safety policy for the Industrial Safety Department and Volunteer Sections of the National Safety Council. The areas of concern of the National Safety Council Industrial Conference include bus and truck fleet safety.

I have worked extensively in the safety engineering field since 1946. From 1946 through 1951, I was employed as a casualty insurance safety engineer with American Surety Company and New York Casualty Company, both located in Memphis, Tennessee. My responsibilities as an insurance safety engineer included the inspection of the activities and facilities of bus and truck fleet servicing operations.

During the period 1952 through 1959, I was employed as a civilian safety engineer with the United States Air Force. My assignments with the Air Force included the following: Safety Director, 18th Air Force, Troop Carrier Command, Greenville, South Carolina; Chief Safety Engineer, United States Air Force, Europe; Safety Director, Wright-Patterson Air Force Base, Ohio; and Safety Director, Central Air Defense Force, Kansas City, Missouri. In each of my assignments as a civilian safety engineer with the Air Force, I had responsibility for the industrial health and safety of all personnel serving in

that particular command, including personnel servicing multi-piece truck and bus rims.

In 1960, I left the Air Force to join the United States Department of Labor. During the period 1960 through 1969, I had the principal responsibility within the Wage, Hour and Public Contracts Division of the Department of Labor, and later its Bureau of Labor Standards, for administering the health and safety provisions of the Walsh-Healey Public Contracts Act, the McNamara-O'Hara Service Contracts Act, and the Construction Safety Act. In that position, I developed several national safety standards which are still in effect and administered by OSHA or other federal agencies for the protection of employees from workplace hazards. These standards include the Non-ionizing Radiation Standard, the Noise Standard, and the Radon Daughter Standard.

During 1967-1970, I worked with Congress as a representative of the Department of Labor to draft and obtain enactment of the Occupational Safety and Health Act of 1970.

When the Occupational Safety and Health Act became effective in 1971, I was named the first Compliance Director of the Occupational Safety and Health Administration (OSHA), and served in that capacity through 1972. As Compliance Director, I had principal responsibility for the enforcement of the Occupational Safety and Health Act. In 1973, I was named Director of Federal Safety under the Secretary of Labor with responsibilty worldwide for health and safety in all the government's civilian and military activities. Each of my assignments within the Department of Labor included responsibility for safety in the areas of motor vehicle servicing and operations.

*Appendix E—Affidavit of J. B. Sechrist.*

In early 1975, I retired from government service, and since that time I have been a safety and health consultant for private industry and several governmental agencies. In the course of my consulting activities, I have advised a variety of firms on the safety requirements under the Occupational Safety and Health Act relating to the servicing of multi-piece and single piece rims.

In addition to my experience in the safety engineering field, I have also lectured at various universities on the subject of workplace safety.

Since 1946, I have inspected bus and truck multi-piece rim servicing operations at dozens of bus and truck rim servicing facilities, including workshops maintained by major truck fleets, stores and garages operated by rim manufacturers, independent truck servicing facilities, small garages, bus servicing facilities, municipal fleet service centers, and military vehicle service facilities. I conducted many of these inspections in my capacity as the federal governmental official charged with responsibility for the safety of personnel servicing motor vehicles.

You should also know that I have additional experience which has given me more than just a safety engineering or safety regulatory perspective. I have the perspective of myself having had responsibility for schools—actually, for whole school systems—and for all aspects of their operation, including the safety and wellbeing of all persons and property connected with them.

*Appendix E—Affidavit of J. B. Sechrist.*

First, during 1962-63, I was a Member and Chairman of the Fairfax County School Board in Virginia. We had one of the largest fleets of school buses in the United States, owning and operating over 500 school buses. With my vocational background, you can be sure that school bus safety was one of my major concerns, and I was directly involved in school bus safety issues when I chaired the School Board.

Second, in 1970 I was appointed by the Governor to the Virginia State Board for Community Colleges, and I served as a Member of that Board until 1978. Our Board had jurisdiction over 26 colleges with 33 campuses. As you might imagine, our system owned and operated numerous vehicles using multi-piece rims, including buses, as well as vehicles with single piece rims.

This is the education, training, and experience I bring to the issue before you—whether the recently adopted rule specifying the use of single piece rims on school buses should be sustained, or whether the multi-piece rim, along with the single piece rim, should be authorized for school bus use in Maryland.

Let me begin with the bottom line—*single piece rims are not safer for use on school buses and, in fact, are less safe than multi-piece rims for school bus use in Maryland.* That is the key point you need to understand and everything else I have to say only elaborates that point.

First, it is important to understand that neither single piece nor multi-piece rims pose a particularly significant hazard. Compared with other safety risks, working with rims is safe.

Second, to the extent that there is a hazard, it can be eliminated by the observance of workplace safety standards. OSHA has now adopted a rule which requires, as a matter of law, that all tire servicing employees follow a set of safe practice procedures when servicing multi-piece wheels, including the use of restraining devices and using only compatible rim components. Since that standard took effect in 1980, the National Highway Traffic Safety Administration has found "a significant reduction in the number of accidents." (Congressional Testimony of Administrator Raymond Peck in March, 1982.) That trend will continue, not only in the shop but on the road because properly serviced multi-piece rims will not be subject to even the few separations which have occasionally occurred on the road as a result of using worn, corroded, deformed, or mismatched parts.

Unfortunately, there is not yet in place a similar national OSHA standard regulating single piece rims like there is in California. At the time OSHA was considering its multi-piece rim safety standard, the hazards of servicing single piece rims were not fully recognized. Studies since that time have demonstrated the single piece rim presents an equivalent level of risk to that of multi-piece rims before the OSHA standard was adopted. They also show that this risk could be effectively eliminated by implementation of an OSHA safety standard. As a result, OSHA is in the process of issuing a safety standard for single piece truck and bus rims much like the multi-piece rim standard, and we expect it to be published for comment in the next few weeks. Once that regulation is in place, multi-piece and single piece rims should pose equally safe wheel alternatives from a garage servicing standpoint.

*Appendix E—Affidavit of J. B. Sechrist.*

Single piece rims are not well suited to certain uses, however, without more sophisticated and intensive maintenance. Single piece rims are simply not acceptable to school bus operators for use on rough or rural roads (and we can find a substantial amount of such school bus mileage in Maryland) because of the adverse safety and economic implications of this higher maintenance burden. This is because the tubeless tire used with single piece rims is excessively subject to tire failure under such conditions of use, creating an increased risk of school bus accidents, not to mention of numerous stranded buses full of children. Moreover, there will be increased safety hazards for servicing personnel both because of the greater number of servicing events which will be required and because field servicing of single piece bus wheels is much more difficult than multi-piece rims.

Based on all my experience, I have to tell you that it is counter-productive, in terms of safety, to require single piece rims for school buses in Maryland.

Thank you for your consideration.

*Appendix E—Affidavit of J. B. Sechrist.*

MARYLAND STATE DEPARTMENT
OF EDUCATION

HEARING BEFORE THE SCHOOL
BUS RIM TASK FORCE September 23, 1982

TESTIMONY OF J. B. EDWARDS, PRESIDENT
MARYLAND SCHOOL BUS
CONTRACTORS ASSOCIATION

I am the President of the Maryland School Bus Contractors Association, representing over 1100 school bus owner/operators who transport the children of Maryland to school. I am speaking today also on behalf of the National School Transportation Association and the National Wheel and Rim Association. All three organizations and their members are opposed to the present regulation which requires new school buses to use only single piece wheel rims and tubeless tires.

I have only a few points to make here today to help you appreciate why the present rule is wrong and why the choice of multi-piece rims or single piece rims should be left to the school bus operator, not mandated by the government.

I am not an engineer. I do not have a Ph.D degree. I am not here to explain the scientific reasons why the present rule should be dropped. There are others better suited to that task and you will hear from them today.

What I *do* know about is how to operate school buses—sensibly and safely—because I have been doing that for 14 years. What I want to share with you is just a few plain facts.

*Appendix E—Affidavit of J. B. Sechrist.*

*Fact Number 1.* There is no Maryland School bus safety hazard which requires this new single piece rim rule. We have a fantastic school bus safety record. In fact, there has been only one fatality on a school bus in Maryland since 1957, and that accident had nothing to do with tires or rims. This remarkable safety record has been achieved despite the fact that Maryland school buses are travelling over 70 million vehicle miles a year these days, accoring to the State's published figures.

*Fact Number 2.* That remarkable safety record has been achieved on buses with multi-piece rims. In anticipation of this hearing, we surveyed the companies providing pupil transportation in Maryland and found out that 99.4% of the privately owned school buses in Maryland use multi-piece rather than single piece rims. We sought out their safety records and their views on why buses would use one type of rim or the other. The results of the survey were compiled and analyzed for the National School Transportation Association and the Maryland School Bus Contractors by Dr. Gail McCarthy of Palo Alto, California. A copy of the survey and her report are attached, as well as a list of the narrative comments we received from the bus operators. Let me share just a few of the comments with you now:

- "Single piece rims — this type is unreliable.
  — if vehicle comes in contact with curb you break seal then tire goes flat.
  — harder to service.
  — this type is unsafe to use.

*Appendix E—Affidavit of J. B. Sechrist.*

Thanks for asking for our concerns. Hopefully you can overturn this unreal regulation referencing the single piece rim. I can't believe anyone would ever want this type rim because it is unsafe to use and it is also harder to change it is also unsafe to change versus tube type. My feelings in dealing with tube type vs. tubeless there is only one type of rim and that is (tube type). I am talking of experience with my bus service and also talking to *my* experience with 578 pieces of government equipment that I am responsible for also. So you can see I have the concerns at heart."

- "Multi piece rims—no stretching and beading. I have been a school bus contractor since 1927 continually, have used multi-piece rims all these years and have never had a blow out rim. Changing time for a tire not more than 10 minutes and don't have to beat the tire to pieces or stretching till it gets oversized. We operating since the last 10 years over 70 buses including my sons and never had any trouble. Do you look for a better example? Of course we clean the rims every time when changing. I had a few Fords and GMC had to bring them to garages to get them changed so complicated. We are safety minded and know what improvements should be made if any better than the men just sitting behind the desk. Thanks for the opportunity to let you know about our feeling to this questions."

- "I am an automobile mechanic for 30 years. Tubeless tires are not adequate on school buses."

- "We have never had any type accident or problems related to the multi-piece rims involving school children or anyone or anything.
  I can only see a harder time for the contractors who have to work on the one piece rims when it comes to replacing or repairing tires."

- "The children's lives are the most important factor. If one tire blows on the back you still are safe to run. In the one-piece you're other tire will go in a short time. Lives *can not* be replaced! I don't think we should be forced to use a tire we don't feel is safe and we feel it endangering lives.
  Single piece rims — have no idea why they would decide to use when it has been proven they are less safe."

This is not just the experience of school buses in Maryland. In a 1980 survey of school bus fleets from all over the nation, Failure Analysis Associates found that not only did multi-piece rims account for nearly 97% of bus rim use among the respondents, but it was the overwhelming opinion of users of both types of rims that the multi-piece rim-tire assembly was safer than the single piece assembly for school bus use. More importantly, it was found that, when it came to the bus operating, as opposed to servicing, environment, the accident rate associated with single piece rims and tubeless tires was *162 times* the accident rate related to multi-piece rims rim assemblies.

*Appendix E—Affidavit of J. B. Sechrist.*

*Fact Number 3.* The practical reasons behind these statistics can be readily seen. I have here with me today a single piece rim and a multi-piece rim. Let me briefly explain how they work. [Demonstration Follows.]

So you can see the basis for some of our safety concerns. For example, there is the problem of the short tire bead on a tubeless tire and how this permits the tire to slip off the rim if not properly mounted. There is the fact that metal invariably gets fatigue cracks in it and, even though they are tiny, these cracks permit air to escape from a tubeless tire on a single piece rim. Another problem is that moisture inevitably gets in here between the tire and the rim, and the rusting which follows pushes the tire away from the rim and lets air escape. Going over bumps and potholes or around sharp corners causes the tubeless tire to separate slightly from the single piece rim, again letting air out of the tire. None of these problems affects the multi-piece rim and tube tire. Similarly, most any good cut or abrasion on the sidewall of a tubeless tire will cause an instant blowout, but not in a multi-piece rim assembly, though puncture of the tube tire by a nail is a possibility with a multi-piece rim assembly. All of these are aspects of the operating difference between the two types of rims.

Looking at these rims you can also see the nature of the servicing problems they present. With the multi-piece rims, you can see how the parts fit together and how if they are not properly assembled, the tire pressure can force the ring to separate violently. However, the rim has a locking mechanism which prevents the ring from separating when properly assembled. Tires can be mounted on the multi-piece rim without distorting or breaking the tire bead as frequently happens with the single piece rim.

This is not an exhaustive list of servicing pitfalls. Failure Analysis Associates Phase IV study covers others. Moreover, I am afraid there will be an additional safety hazard which results from the new single piece rim rule. That will come from school bus personnel having to service single piece rims though many have little or no experience with its very different technology.

*Fact Number 4.* I understand that the State Board of Education did *not* adopt the present regulation based on a thorough discussion or analysis of the issue. This is important because you should *not* feel that the present regulation is entitled to any special deference on the ground that it reflects the Board's recent analysis of the facts and the evidence—the regulation simply is not the product of fact finding or analytical decision-making. On the contrary, it is my understanding from Dick Alexander and the official minutes of the Board's meetings that there was *not any* discussion by the Board of whether single piece rims should be required as opposed to multi-piece rims. Nor did the Board hear any testimony or consider any evidence on the subject, other than the passing mention by Dick Alexander's predecessor, Dr. Gaddis, that several groups had recommended against adopting the regulation but that the Department staff rejected this because they thought single piece rims were "safer for garage personnel and, in some cases, pedestrians."

Instead of receiving careful scrutiny, the regulation was adopted as part of a broad package of pupil transportation regulations, others of which did engage the Board's attention, to some degree. Thus, the rule deserves no special deference from you in that it does not represent the considered judgment of the Board.

*Appendix E—Affidavit of J. B. Sechrist.*

*Fact Number 5.* According to Dick Alexander, the regulation was recommended by a specifications committee of transportation personnel. Although it was based on this ad hoc group's belief that the single piece rim was safer than the multi-piece rim, they had done no studies themselves and had no evidence to support this belief other than that one or more members of the group had heard of someone having been injured by a multi-piece rim.

*Fact Number 6.* The only data which we have furnished to the Department before is a 1980 survey of school bus fleets which indicated that single piece rims were less safe than multi-piece rims in the experience of these school bus operators, *particularly* in school bus operations, as opposed to in the garage. This survey was the data which was given to the ad hoc specifications committee after the regulation had already been adopted, as noted in the second paragraph of the Background Statement you have been given by the Department. Frankly, we thought that no more data was needed for the Department staff and the committee to recognize the error of requiring school buses to use single piece rims. Because the Department staff did not respond to that survey, in spite of its persuasive character, we requested a hearing, such as is being held today, to present enough information to fully inform the Department on school bus rim safety.

*Fact Number 7.* One point you should note is that the single piece rim regulation was adopted under a mistaken premise that there would be no cost impact. This was presumably because the requirement applies only to newly acquired buses. *Technically* this may be true, but as a *practical* matter, it is false. Although the regulation

only requires single piece rims on newly acquired buses, as a practical matter operators are going to *have to* replace existing multi-piece rims. Once the State has effectively ruled that school buses should have single piece rims for safety reasons, continued use of multi-piece rims creates the risk of unacceptable, and to some extent, uninsurable, legal liability. This pressure will force great expense on school bus operators in buying thousands of new, unneeded rims, at a cost in the millions of dollars. There is the additional cost of obtaining the tire changing machine which you need to change the tire on a single piece rim—that runs some $4,500—$5,000 alone. The machine weighs about 1000 pounds and takes up valuable shop space as well. Of course, there is also a cost impact in that single piece rims cost about $23 per rim more than multi-piece rims.

*Fact Number 8.* It is not solely *private* school bus companies which oppose the single piece rim requirement. We are joined also by the National Association for Pupil Transportation, the group which represents *public* school transportation administrators and the state directors of pupil transportation. The NAPT does not support outlawing multi-piece rims for school bus use. Instead, it supports the National Minimum Standards for School Buses, which permits multi-piece rims.

*Fact Number 9.* The real experts—those who have professionally studied rim technology, rim hazards, and safety engineering—agree that single piece rims are not safer than multi-piece rims for school buses. It is time you heard from them.

Thank you.

*Appendix E—Affidavit of J. B. Sechrist.*

## NATIONAL SCHOOL TRANSPORTATION ASSOCIATION AND MARYLAND SCHOOL BUS CONTRACTORS SURVEY ON "SCHOOL BUS WHEEL SERVICING"

September 1982

### *SURVEY REPORT*

A poll on tire and wheel type and service was conducted among the private owner/operator school bus contractors in the state of Maryland. The poll requested information for the last school year 1981-1982. The Maryland Department of Education estimates that approximately 4,900 school buses were operated during that period and that approximately half, or 2,450 buses, were operated by private contractors. To date, 223 private contractors who operated a total of 1,150 school buses have responded to the poll. Table 1 shows a breakdown of the responses by bus fleet size (number of buses per operator/respondent) and by tire/rim type.

The overwhelming majority (99.4%) of buses, 1,143 out of 1,150 described in the responses, operated with tube tires and multi-piece rims. *Only 7* of the buses covered in the responses were operated with tubeless tires and single piece rims. Each of the seven was operated by a different respondent; four of the seven respondents also operated other bus(es) with tube tires. Many respondents indicated, without being asked, that they had never had any experience with tubeless tires/singe piece rims on buses.

*Not a single school child was injured in an accident attributable to a tire or rim problem during the 1981-1982 school year.* Several operators stated they had never had any such accident in their history, one commentor having begun school bus operations in 1926.

Of the 1,150 buses covered by responses to the survey, 1,024 buses indicated records of 2,777 tire changes. (Records of the numbers of tire changes were not available for the remaining 126 buses.) If all of the buses in Maryland experienced similar tire change frequencies, then a simple ratio yields an estimated 13,300 tire changes for 4,900 buses for the year. During this same period, the Maryland Department of Education estimated 71.4 million miles of bus travel. Since each bus has 6 wheels, this is equivalent to 428 million miles of tire travel. 13,300 tire changes in 428 million miles of tire travel is equivalent to an average of 32,000 miles between tire changes on an average wheel.

*Factors Affecting Choice of Tire/Rim Type*

The respondents were asked to indicate reasons why tube tires/multipiece rims and why tubeless tires/single piece rims were used on school buses. Of 223 respondents, 211 indicated reasons why tube tires/multipiece rims are used and only 54 indicated reasons why tubeless tires/single piece rims are used. Of those 211 respondents, more than half indicated ease of service, reliability, cost of rim and tire, and safety as reasons why tube tires/multipiece rims are used on school buses. Of the 54 respondents who indicated reasons why tubeless tires/single piece rims are used on school buses, there was no factor identified by more than half of the 54. In addition to the 54 who indicated a positive reason for use of tubeless tires/single piece rims on school buses, there were 40 respondents who wrote comments as to why multipiece rims and tube tires were better than single piece rims and tubeless tires for school buses.

Of those respondents who indicated greater safety for one type of rim and tire, 22 thought the multipiece rim and tube type tire was safer and 17 thought single piece rims and tubeless tires were safer. All but one of the 17 continue to operate multipiece rims/tube type tires on their buses. Two of the 7 operators using tubeless tires/single piece rims expressed the view that multipiece rims and tube type tires were safer.

## *SUMMARY*

The response to the survey indicate:

1. An excellent safety and performance record with school bus tires and wheels in the state of Maryland. There were no reported wheel or tire failure accidents resulting in student injury.

2. An overwhelming majority (99.4%) of buses are operated with multipiece rims and tube tires.

3. Multipiece rims and tube tires are preferred by most for school buses because of ease in service, reliability, cost and safety.

4. Many school bus operators have had no experience with tubeless tires/single piece rims.

## TABLE 1—RESPONSES TO SURVEY OF PRIVATELY OPERATED SCHOOL BUSES IN MARYLAND

| *Fleet Size* | *Number of Responses* | *Number of Buses* | *Buses With Tube Tires* | *Buses With Tubeless Tires* |
|---|---|---|---|---|
| 1 Bus | 91 | 91 | 88 | 3 |
| 2 to 10 Buses | 109 | 437 | 434 | 3 |
| 11 or more Buses | 23 | 622 | 621 | 1 |
| | 223 | 1150 | 1143 | 7* |

* Each operated by a different respondent.

## APPENDIX F

**Motion to Supplement the Record**

IN THE UNITED STATES DISTRICT COURT
for the Middle District of Pennsylvania

REDCO CORPORATION,

*Plaintiff,*

v.

CBS, INC. and THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY,

*Defendants.*

Civil Action No. 82-0263

MOTION TO SUPPLEMENT THE RECORD PRIOR TO ENTRY OF JUDGMENT UPON THE MOTIONS OF THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY AND CBS, INC. FOR SUMMARY JUDGMENT

Donald L. Reihart, counsel for Redco Corporation, Plaintiff in the above-captioned matter, respectfully represents:

1.

On March 3, 1982, Redco Corporation filed a Complaint against CBS, Inc. and The Insurance Institute for Highway Safety.

2.

Answers were filed by the Defendants in April of 1982.

3.

On December 10, 1982, Redco Corporation filed a Motion for an order compelling discovery and a Motion to compel answers to Interrogatories.

4.

In its Motion for an order compelling discovery, Redco Corporation made a request for the transcripts and tapes of all interviews conducted in preparation of the 60 Minutes segment entitled "Killer Wheels", but never actually broadcast as part of that segment that was aired March 8 and September 6, 1981.

5.

CBS, Inc. refused to grant the request of discovery on the basis that it was in violation of their Constitutional rights and the Pennsylvania Shield Law.

6.

The Court was advised in Exhibit "A", in an affidavit filed with the "Motion for a Continuance by Virtue of Inability to Present Essential Facts", that the Plaintiff desires to use the services of an expert witness.

7.

Paragraph 39 of the affidavit indicated "Plaintiff intends to obtain an affidavit from Thomas W. Benson, professor at the Pennsylvania State University in support of its response to Defendant, CBS, Inc., Motion for Summary Judgment. Paragraph 40 stated: "Plaintiff will be unable to obtain Mr. Benson's affidavit until he has an opportunity to review the program and its out takes, if available."

8.

Because the Court was considering the Motion to Compel, at the same time it was considering the Motion for Summary Judgment of Redco Corporation, the Plaintiff was unable to obtain the affidavit or even the deposition of Dr. Benson, since the expectation was that a ruling of some kind would be made with reference to the request for the "out takes" and information Dr. Benson needed to examine before expressing a complete opinion.

9.

The testimony of Dr. Benson would be extremely helpful to the Court in making a final decision concerning whether or not the CBS, Inc. program "Killer Wheels" was capable of a defamatory meaning. Counsel for Redco expects Dr. Benson to testify that order of presentation, the number of interruptions, the use of shocking visual aids and placement of "cutaways" and other broadcast techniques, determine the message received by the average viewer. A court cannot make a fair and independent evaluation of the message broadcast in a television publication without consideration.

10.

The Insurance Institute for Highway Safety has filed a Motion to Strike the affidavit of Dr. Benson because it does not comply with alleged technicalities set forth in Rule 56(e), Federal Rules of Civil Procedure.

11.

While the Plaintiff does not agree that the affidavit filed for the Court's consideration does not comply with the technical requirements of Rule 56(e), the Plaintiff does admit that the affidavit may not be as helpful and pursuasive to the Court in passing upon the question of whether or not the broadcast was defamatory or not.

12.

Dr. Benson has had substantial experience in the area of television and the field of communication.

13.

The question of whether or not a broadcast is capable of defamatory meaning is a question for the Court to decide. However, that decision should be based upon all information which may be produced by Plaintiff prior to the final decision being made.

14.

The Plaintiff, Redco Corporation, has suffered substantial damages estimated to be in excess of $250,000.00 as a result of the CBS, Inc. broadcast.

15.

The Plaintiff has not had the opportunity to present its claim to a jury.

16.

To enter Summary Judgment without giving the Plaintiff the opportunity to provide expert testimony on the issue of what message was broadcast by the television program is fundamentally unfair.

17.

Dr. Benson's affidavit provides some insight into the psychological complexities that exist with reference to the dissemination of information by television, but only by deposition may the full benefit of Dr. Benson's knowledge and experience be presented to the Court.

18.

The Court's initial judgment was made without the benefit of this scientific helpful information.

19.

Plaintiff, Redco Corporation, moves your Honorable Court to grant a continuance for a stated period of time, during which time the testimony of Dr. Benson may be presented directly to the Court or if the Court does not find time to take testimony, to permit a deposition to be taken and submitted to the Court prior to the making of a final judgment on whether or not the "Killer Wheels" program was capable of a defamatory meaning.

LAUCKS & MONROE

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## APPENDIX G

**District Court Opinion Entering Summary Judgment in Favor of CBS**

IN THE UNITED STATES DISTRICT COURT
for the Middle District of Pennsylvania

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REDCO CORPORATION,

*Plaintiff,*

vs.

CBS, INC.; and THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY,

*Defendants.*

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Civil Action No. 82-0263.

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FILED
HARRISBURG, PA.

JAN 25 1984

DONALD R. BERRY, CLERK
PER MKG
Deputy Clerk

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MEMORANDUM

The present action concerns a television broadcast of a *60/Minutes* segment entitled "Killer Wheels." Defendant, CBS, Inc. [hereinafter CBS], broadcast the program on March 8, 1981, and September 6, 1981. The segment concerned the use of multi-piece tire rims and the question of whether the rims presented a safety hazard.

*Appendix G—District Court Opinion Entering Summary Judgment in Favor of CBS.*

On March 3, 1982, Redco Corporation [hereinafter Redco], a manufacturer of multi-piece rims, filed suit against CBS and the Insurance Institute for Highway Safety [hereinafter Insurance Institute], alleging trade-libel disparagement, defamation, intentional interference with business relations, and conspiracy.

Currently before the court are CBS's motion for summary judgment and Redco's motion to compel discovery. We will first address CBS's summary judgment motion. Due to the nature of the motion and the substantive issues raised, however, it is first necessary to summarize the "Killer Wheels" program.

*I. THE CBS BROADCAST*

The original broadcast of "Killer Wheels" occurred on March 8, 1981, on *60 Minutes*, which CBS describes as a news magazine program. The segment was produced by Allan Maraynes and was narrated by Mike Wallace. In the promotional introduction to *60 Minutes*, a 250-pound dummy was bent over a large tire and was blown to pieces by an exploding wheel rim. As the explosion occurred, Mike Wallace narrated that unlike the single-piece rims on automobiles, most truck and bus tires were made with two or three piece rims, such as the one that had just exploded. Then Gary Gardner, a lawyer involved in multi-piece rim litigation, was shown saying, "These things will kill you, if you don't have the required knowledge to assemble them." Transcript of *60 Minutes*, Exhibit A of Complaint [hereinafter Transcript], at 2.

*Appendix G—District Court Opinion Entering Summary Judgment in Favor of CBS.*

Following other promotional material and various advertisements, Wallace began the "Killer Wheels" segment with:

> Killer wheels—that's what many truck drivers and tire mechanics are calling some wheel rims now riding on our highways .... [W]e're dealing only with the wheel rims on trucks and buses and some campers. They are called multi-piece wheel rims, and accidents involving them, according to U.S. government statistics, have killed more people than have died in accidents involving the Ford Pinto or the Firestone 500 tire.
>
> So, it's no surprise that there has been a call to ban these wheel rims from the highways. That is part of our report. But this is also a story about the companies that make these wheels, about decisions made by large corporations in weighing the costs and benefits of selling potentially dangerous products.

Transcript, at 2-3.

At this point, the explosion of a multi-piece wheel rim and its devastating effects on a 250-pound dummy were shown again, with Wallace explaining that this was a test film made by the Insurance Institute for Highway Safety [Insurance Institute]. Part of the film was rebroadcast in slow motion. Wallace then introduced Ben Kelley from the Insurance Institute who explained how a rim could explode with such force. Kelley stated that because multiple pieces were used, if any piece failed for whatever reason, a piece of metal would fire through the air at a tremendous speed. Kelley concluded that the

piece could fly into whatever is in its way, "which is very often a serviceman's head." Transcript, at 3. The camera then focused on Wallace showing examples of a single rim and a multi-piece rim.

Wallace next introduced the father of a young man who had suffered permanent brain damage from a piece of rim hitting him in the head. Pictures of the injured man were shown.

To explain the potential force behind a multi-piece rim separation, Wallace presented a film produced by Goodyear, one of the manufacturers of multi-piece rims. The film's narrator discussed how the force of an exploding tire-and-rim assembly could hurl a 16-pound bowling ball a half-mile or raise a 3,000-pound car fifteen feet off the ground. The film concluded by showing an explosion of a rim. Transcript, at 3-4. The purpose of the Goodyear film was to caution its servicemen to handle multi-piece rims with care.

Following this film, Wallace explained that the multi-piece rim manufacturers knew of the potential hazards, but that they claimed accidents only occurred from improper servicing procedures and that such accidents were rare. Wallace quickly noted that Kelley "says that's not so. . ." and that the federal government knew of one hundred deaths and 400 injuries involving rim explosions. Transcript, at 4. Kelley was then shown stating, "But we are reporting what's known, and we have every reason to believe that what's known is just the tip of the iceberg, because no data are collected on these." *Id.*

Wallace next quoted Kelley as saying that these accidents often involved innocent bystanders. He showed a test film, utilizing dummies, which showed the possible harm to a family when the father attempted to put air in a camper multi-piece tire. The program again switched to the interview between Kelley and Wallace, with Kelley strongly implying that the "so-called freak accidents", involving innocent bystanders walking by a multi-piece rim as it exploded, were not so freak. Transcript, at 4. Kelley, who clearly was against the use of multi-piece rims, said that a single-piece wheel could replace the multi-piece wheel, with no pieces of metal able to separate from the wheel. Transcript, at 4.

Wallace then rhetorically posed a question to the television audience on why truck drivers preferred multi-piece rims to single-piece rims. His answer was, "Some say it's because it is much more difficult to mount and service the single-piece, and it is for that reason, say the manufacturers, that its entry onto the market has been slow. But back to multi-piece rims." *Id.*

Wallace claimed that tire makers insisted that multi-piece rim accidents could be prevented if the tires were inflated in safety cages. Yet, he reported that a "good number" of accidents occurred after the tire was inflated and out of the cage. As an example of this, the program had a portion of an interview with Mary Ehmann, whose son had been killed by an exploding rim after he had inflated it and placed it on the floor. Mrs. Ehmann described how ten to fifteen people, in consoling her, told her of similar accidents and how she came to believe these accidents were not so freak. Transcript, at 4-5.

Wallace asked her why she had not sued the manufacturers and she responded her son had not been a vindictive person.

Wallace then described an individual who had sued a manufacturer due to a mismatch of rim parts. In introducing the individual's lawyer, Wallace stated, "[H]is lawyer, Gary Gardner, held Firestone, the manufacturer responsible." Transcript, at 5. The program continued as follows:

> GARY GARDNER: They could very easily have stamped a warning on those pieces. Just say, "Do not handle. Danger." You know, "These things will kill you if you don't have the required knowledge to assemble them." Their obvious defense was, as they have tried to defend in all the cases, that when you stamp those things on the rim, you create stress points. And our engineer said that's poppycock. They didn't have any trouble stamping their name on it.
>
> WALLACE: A jury awarded Clifford Griggs more than a quarter-million dollars, after Gardner contended that Firestone, the manufacturer of the rim, had a duty to print a warning on each rim telling users about the risks involved in assembling them. It's interesting to note that after the Griggs' decision, Firestone did consider putting warning labels on multi-piece rims. One internal memo says: "As interpreted by the government and the courts, we do have a duty to warn." And goes on to say, "We would not want to use the word 'kill,' as this would have a negative reaction from our

customers." Firestone and Goodyear even went so far as to write sample warnings, but they didn't use them.

GARDNER: If they put a warning on now—they know that they have got millions of these rims out in the pub—public's hand right now—they are either going to have to recall those immediately, which will cost them a substantial sum of money, and they know it, or the lawyers are going to be able to show that now you put the warning on the new ones, why didn't you recall the old ones? Why didn't you get on television and tell the public, don't handle these rims unless you're trained to do so? Because that would cost them money, that's why they won't do it.

Transcript, at 5.

After Gardner's comments about multi-piece rim manufacturers, Wallace named four major manufacturers of such rims: Goodyear, Firestone, the Budd Company, and the Kelsey-Hayes Corporation. Redco was not named. Wallace stated that they had been asked to respond to questions, "but for various reasons, including their involvement in numerous lawsuits over multi-piece-rim accidents, they declined. Firestone, however, did tell us that accidents involving multi-piece rims are so rare that they don't merit this kind of attention." Transcript, at 5-6.

Wallace repeated that the manufacturers insisted that multi-piece rims were no more dangerous than single-piece rims. Still, he reported, the National Highway Traffic Safety Administration [hereinafter NHTSA] was considering a proposal to ban the rims. He continued

that one particular rim, no longer in production but still being used, was considered so dangerous that the NHTSA had asked the manufacturers to voluntarily recall them, but they refused to do so.

At this point, the program turned to the RH5° rim and an interview with Jack Bradley, a former Budd Company executive. When Bradley responded to Wallace that multi-piece rims absolutely were not dangerous, Wallace sounded surprised and queried, "Not dangerous?" Transcript, at 6. Bradley proceeded to explain how single-piece and multi-piece rims were both safe rims, with the incidence of problems of each not significantly different. Bradley stated that the problems with multi-piece rims generally arose from poor maintenance or carelessness.

Wallace asked whether the Budd Company was fairly satisfied with the multi-piece rim, particularly the RH5° design, to which Bradley responded affirmatively. Wallace then read to Bradley part of a letter from Paul Hykes, Budd's former chief engineer, which stated:

> "It is more subject to dangerous wear than other designs. The only time this dangerous wear can be detected is when the rim is dismantled . . . The RH5 can be put together improperly and subsequently blown apart when new. From the foregoing you can readily understand why I ask the question, 'Why has this rim not been removed from the market.' "

Transcript, at 6. Bradley was visible surprised by this letter and swore that he never knew Hykes had these opinions while Hykes worked for Budd.

Wallace narrated that if Bradley didn't know of Hykes' feelings while Hykes was with Budd, Bradley did consider the effects of the criticism. Then, Wallace read part of a memo *Bradley* had written that said publicity would be detrimental. The program proceeded with further excerpts of the interview where Bradley appeared flustered, yet laughing. Transcript, at 7. Wallace then revealed that two engineers at Goodyear's Motor Wheel Division had issued a report that concluded multi-piece rims were inherently dangerous. Wallace read a part of the report, " 'Any positive action to get parts out of use will probably result in more liability suits and higher damage awards. But at the same time, it should reduce the number of accidents.' " Transcript, at 8.

Wallace thus questioned, "If multi-piece rims are so dangerous, why hasn't the U.S. government ordered them off the road?" *Id.* He answered his own question by reporting that the federal statute of limitations prevented the mandatory recall of most of the RH5° rims. He next stated, "Therefore, the responsibility would seem to fall upon the manufacturers." *Id.* Joan Claybrook, former head of NHTSA, absolutely agreed with Wallace's assessment. The following exchange then occurred between Claybrook and Wallace:

> CLAYBROOK: [The responsibility] falls upon the manufacturers. And you haven't asked me if I were the manufacturer would I recall this, and I think that the answer is that it's the only ethical thing for the manufacturer to do.
>
> WALLACE: Why do you think they refused?

> CLAYBROOK: If they were to anow—acknowledge a defect by recalling this wheel, then that would be used against them in those product-liability cases. And it is, in most cases such as this, a financial decision by the manufacturer.
>
> WALLACE: So, it comes down to money versus human life?
>
> CLAYBROOK: There's no question about that. It comes down to that in the manufacture of cars today. Cars are not manufactured as safely as they can be, and the answer is money. That is the reason why not, and even though it's pennies in many cases.

Transcript, at 8.

At this point, the camera focused on Wallace asking Bradley if RH5° rims should be recalled. Bradley responded negatively, observing that the rims were statistically the safest part made by Budd. The program concluded with Wallace questioning whether accidents were simply part of the bargain and with Bradley stating, "This is the way life is."

*II. CBS's Motion for Summary Judgment*

As noted above, Redco, a manufacturer of multi-piece rims, filed suit against CBS for trade libel and defamation.[1] Particularly, Redco claims that CBS depicted multi-piece rims as dangerous and their

[1] Although Redco raised four causes of action, we will limit our discussion at the present to those counts alleging trade libel and defamation, counts I and II of Redco's complaint.

manufacturers as cold-hearted corporations that cared more for money than for human lives. CBS denies these allegations but argues that even if the program did make such representations, no actionable defamation or trade libel occurred.

This case rests upon complicated legal principles and factual considerations. CBS asserts that all the statements in the program are true or are unactionable opinions. CBS claims that Redco cannot refute the veracity of the statements and that Redco merely is upset that more favorable facts or opinions were not presented in the program. An element of truth exists in CBS's arguments. Nevertheless, Redco posits a strong argument that the television program implied that multi-piece rims are dangerous and that their manufacturers are unethical.

*A. The Applicable Law*

Redco insists that New York law applies in this case, not Pennsylvania. As this case is before us on diversity jurisdiction, we must apply the choice of law rules of Pennsylvania. KLAXON v. STENTOR ELECTRIC MANUFACTURING CO., 313 U.S. 487, 496 (1941); SUCHOMAJCZ v. HUMMEL CHEMICAL CO., 524 F. 2d 19, 23 (3d Cir. 1975). In GRIFFITH v. UNITED AIR LINES, 416 Pa. 1, 203 A. 2d 796 (1964), the Pennsylvania Supreme Court rejected the lex loci conflicts of law rule and replaced it with the most significant contacts or relationship rule. *See also* HACK v. HACK, 495 Pa. 300, 317, 433 A. 2d 859, 868 (1981).

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In this case, the allegedly defamatory and disparaging program was broadcast throughout the United States. Redco's residence and place of business is Pennsylvania. Defamation laws represent the state's interest in protecting its citizens' reputation. A good reputation is a valuable asset to one's business. FITZPATRICK v. MILKY WAY PRODUCTIONS, INC., 537 F. Supp. 165, 171 (E.D. Pa. 1982). Accordingly, since a plaintiff's domicile contains most of a plaintiff's reputational contacts, "the state of plaintiff's domicile generally has the greatest concern in vindicating plaintiff's good name and providing compensation for harm caused by the defamatory publication." *Id.* The Restatement, Second, Conflict of Laws §150(3) (1971) also provides: "When a corporation . . . claims that it has been defamed by an aggregate communication, the state of most significant relationship will usually be the state where the corporation . . . had its principal place of business at the time, if the matter complained of was published in the state." *See also* SYSTEM OPERATIONS v. SCIENTIFIC GAMES DEVEL. CORP., 555 F. 2d 1131 (3d Cir. 1977) (applying similar rule in product disparagement cases). Redco has provided no persuasive arguments to justify the application of New York substantive law. Thus, Pennsylvania law applies in this diversity action.

*B. Was the Broadcast of and concerning Redco and its Products?*

CBS correctly asserts that Redco has the burden of proving that the allegedly defamatory statements applied to it and that the recipients of the statements reasonably understood the statements as intended to

apply to Redco. 42 Pa. C.S.A. §8343(a)(3), (5); Restatement, Second, Torts §613(1)(c), (e). The rule in trade libel or product disparagement is very similar. Restatement, Second, Torts §651(g) (1981).

CBS makes the following arguments to support its view that the "Killer Wheel" broadcast did not concern Redco or its products. First, the program discussed multi-piece rims in general, of which more than two hundred different types of rims are sold in the United States. Redco only makes three rims. Secondly, the most critical comments in the broadcast concerned the RH5° rim, which Redco does not and apparently never did produce. Finally, the program named only four manufacturers; Redco was not mentioned specifically.

The fact that Redco was not specifically named in the broadcast is not controlling. A party alleging defamation need not be specifically named if the description or circumstances tend to identify the party. SCHONEK v. W.J.A.C., INC., 436 Pa. 78, 82-83, 258 A.2d 504, 506-07 (1969); COSGROVE S. & C. SHOP, INC. v. PANE, 408 Pa. 314, 319, 182 A.2d 751, 753 (1962). Though, "[w]here a defamatory publication or utterance is directed toward a class or group whose membership is so numerous that no one individual member can reasonably be deemed an intended object of the defamatory matter, no cause of action for libel or slander arises therefrom." SCHONECK, 436 Pa. at 82, 258 A.2d at 507 [footnote omitted], *quoting,* FARRELL v. TRIANGLE PUBLICATIONS, INC., 399 Pa. 102, 104, 159 A.2d 734, 736 (1960). Nevertheless, where a defamatory publication concerns a comparatively small group that readily can be identified and the recipients of the defamatory matter

are likely to identify some members of that group, an individual member of the group can bring a defamation action for damages to the individual's reputation. FARRELL, 399 Pa. at 105, 159 A.2d at 736-37.[2] It is the court's role to determine if a recipient of the communication could reasonably conclude that the communication referred to the plaintiff; it is the jury's duty to determine if the recipient actually concluded that the defamatory matter referred to the plaintiff. 399 Pa. at 109-110, 159 A.2d at 737.

In reviewing the "Killer Wheel" broadcast, we find that any viewer or listener to the program could reasonably conclude that the alleged defamatory matter referred to Redco and its products. Regardless of the fact that CBS only mentioned four particular manufacturers, the broadcast clearly referred to multi-piece manufacturers in general. Redco claims CBS made twelve general references to multi-piece rim manufacturers in the broadcast; however, the actual number of references to the industry is irrelevant in light of the entire context of the program.

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[2] Restatement, Second, Torts §524A (1981) provides:

> One who publishes defamatory matter concerning a group or class of persons is subject to liability to an individual member of it if, but only if,
>
> (a) the group or class is so small that the matter can reasonably be understood to refer to the member, or
>
> (b) the circumstances of publication reasonably give rise to the conclusion that there is a particular reference to the member.

As Comment b of §524A notes, the cases in which recovery has been allowed for a member of a small group has usually been when there are 25 members or less.

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As Mike Wallace narrated in the introductory remarks of the program, the broadcast concerned multi-piece wheel rims, not any particular type of multi-piece rim. He further stated, "But this is also a story about the companies that make the wheels, about decisions made by large corporations in weighing the costs and benefits of selling potentially dangerous products." Transcript, at 1-2. While Wallace occassionally stated various companies' names during the broadcast, at no time did he say the broadcast was limited to these named companies. Thus, we cannot agree with CBS's claims that the statements in "Killer Wheels" were limited to those four manufacturers named in the program.

Similarly, we reject CBS's assertions that any defamatory statements concerning multi-piece rims were limited to the type of rims mentioned in the broadcast. Throughout the broadcast, Wallace and the people he interviewed discussed multi-piece rims in general. Indeed, more than half the program had been aired before any specific type of rim, the RH5°, was mentioned. Although the RH5° was singled out for special attention,[3] absolutely nc impression was created *anywhere* in the program that conveyed the idea that the alleged dangerousness of multi-piece rims was limited to the RH5° or any other particular rim type.

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[3] Indeed, Wallace first mentioned that the NHTSA was considering *a proposal* to ban *multi-piece rims*. He then observed how certain rims were considered so hazardous, such as the RH5°, that NHTSA has asked the manufacturers to recall them voluntarily. Even when Wallace questioned Bradley about the RH5°, many of his questions concerned the multi-piece rim in general. After concluding the interview with Bradley, the program continued to broadly discuss multi-piece rims and not any other particular rim type.

It is our finding that the "Killer Wheel" program reasonably could be understood by the average viewer to concern Redco and its multi-piece rim products. The program questioned the decision of multi-piece rim manufacturers, of which there are only six in the United States, in their production of multi-piece tire rims. The dangerousness of all such rims was questioned; the program was not limited to any particular rim design. Accordingly, CBS' and Redco's dispute over the number of existing rim designs is inconsequential.

*C. The Underlying Legal Principles*

The threshold question in a defamation action is whether the publication is capable of defamatory meaning. Whether a broadcast can be understood as being defamatory is for the court to decide. STEAKS UNLIMITED, INC. v. DEANER, 623 F.2d 264, 270 (3d Cir. 1980); CORABI v. CURTIS PUBLISHING CO., 441 Pa. 432, 442, 273 A.2d 899, 904 (1971); DUNLAP v. PHILADELPHIA NEWSPAPERS, INC., 301 Pa. Super. Ct. 475, 482, 448 A.2d 6, 10 (1982). " 'A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.' " CORABI, 441 Pa. at 442, 273 A.2d at 904, *quoting*, COSGROVE S. & C. SHOP, INC. v. PANE, 408 Pa. 314, 318, 182 A.2d 751, 753 (1962); STEAKS UNLIMITED, *supra*.

In determining whether statements in the broadcast of "Killer Wheels" were defamatory, we must review the statements in context of the entire broadcast and not simply by the literal language. PIERCE v. CAPITAL

CITIES COMMUNICATIONS, INC., 576 F.2d 495, 502 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978); CORABI, 441 Pa. at 444-45, 273 A.2d at 906; Restatement, Second, Torts §563, Comment d (1981). Additionally, the court must consider the effect the words reasonably were calculated to produce in the minds of the average persons watching the *60 Minutes* program. " 'The words must be given by judges and juries the same signification that other people are likely to attribute to them.' " CORABI, 441 Pa. at 447, 273 A.2d at 907, *quoting*, BOYER v. PITT PUBLISHING CO., 324 Pa. 154, 157, 188 Atl. 203, 204 (1936); FRAM v. YELLOW CAB CO. OF PITTSBURGH, 380 F. Supp. 1134, 1328 (W.D. Pa. 1974).

In a defamation action, the truth of the alleged defamatory communication is an absolute defense. No individual can be liable for uttering a true statement. CORABI, 441 Pa. at 450, 273 A.2d at 908; DUNLAP, 301 Pa. Super. Ct. at 486, 448 A.2d at 11; Restatement, Second, Torts §581A (1981). In establishing truth, the statement need only be proven substantially true. KILIAN v. DOUBLEDAY & CO., INC., 367 Pa. 117, 123, 79 A.2d 657, 660 (1951).

While at common law the defendant had the burden of proof, CORABI, 441 Pa. at 450, 273 A.2d at 908, the constitutionality of this burden of proof has been gravely questioned. DUNLAP, *supra*. In NEW YORK TIMES CO. v. SULLIVAN, 376 U.S. 254, 271 (1964), the United States Supreme Court stated, "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . . and especially one that puts the burden

of proving truth on the speaker." *See also* GERTZ v. ROBERT WELCH, INC., 418 U.S. 323, 347 n. 10 (1974). The United States Court of Appeals for the Third Circuit has also suggested that constitutional principles prevent the burden of proving truth being placed upon the defendant. STEAKS UNLIMITED, INC. v. DEANER, 623 F.2d 264, 272-75 n. 49 (3d Cir. 1980).

Consistent with these federal authorities, the Pennsylvania Superior Court recently refused to follow CORABI and to place the burden of proving truth on the defendant. DUNLAP, 301 Pa. Super. Ct. 475, 448 A.2d 6 (1982). In explaining its decision, the court stated:

> In GERTZ, the Court said, "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." [GERTZ, 418 U.S. at 347]. Because the reason for placing the burden of truth on the defendant is that falsity is presumed, it has been urged that the common law rule does precisely what GERTZ forbids: it holds a defendant strictly liable in a case where truth cannot be proved.

DUNLAP, 301 Pa. Super. Ct. at 485, 448 A.2d at 12.

Similar to truthful statements, pure opinions do not create liability for defamation. Rather, only those opinions which imply the allegation of undisclosed false facts justifying the opinion are defamatory. BRAIG v. FIELD COMMUNICATIONS, _____ Pa. Super. Ct. _____, _____, 456 A.2d 1366, 1372 (1983); BECKMAN

v. DUNN, 276 Pa. Super. Ct. 527, 535, 419 A.2d 583, 587 (1980); Restatement, Second, Torts §566 (1981). *See also* BOGASH v. ELKINS, 405 Pa. 437, 440, 176 A.2d 677, 679 (1962) (statements representing differences of opinions, without more, are not libelous). It is firmly established that "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." GERTZ, 418 U.S. at 339-40 (footnote omitted). Only when a derogatory opinion creates the reasonable inference that it is based upon unexpressed defamatory *facts* is the opinion capable of bearing a defamatory meaning. Restatement, Second, Torts §566, Comment c (1981).[4]

Finally, we observe that the use of rhetorical hyperbole or "colorful" language when presenting statements of facts or opinions does not render a communication defamatory. PIERCE, 576 F.2d at 504; FRAM, 380 F. Supp. at 1327 2n. 10; SELLERS v. TIME, INC., 299 F. Supp. 582, 585 (E.D. Pa. 1969), *aff'd*, 423 F.2d 887 (3d Cir.), *cert. denied*, 400 U.S. 830 (1970). A "flippant" or

[4] As one court has observed, a statement is factual if it relates to an event or state of affairs that existed in the past or present and is capable of being known, such as a person's conduct or character. "An opinion, on the other hand, is a personal *comment* about another's conduct, qualifications or character that has some basis in fact." GOODRICH v. WATERBURY REPUBLICAN-AMERICAN, 188 Conn. 107, _____, 448 A.2d 1317, 1321 (1982) (emphasis in original) The court continued, "although an opinion may appear to be in the form of a factual statement, it remains an opinion 'if it is clear from the *context* that the maker is not intending to assert another objective fact but only his personal comment on the facts which he has stated.' " *Id.* (emphasis added) (quoting Restatement, Second, Torts §566).

"smart alecky" style of writing adds a more interesting style to a communication. SELLERS, 299 F. Supp. at 585. In PIERCE, the Third Circuit observed that introductory remarks warning the public to "hold onto your dollars" and reporting that the investigator had pursued the "high speed road to profit" were merely hyperbole. 576 F.2d at 504. *See also* GOODRICH v. WATERBURY REPUBLICAN-AMERICAN, 188 Conn. 107, _____, 448 A.2d 1317, 1326 (1982) (a reporter is constitutionally permitted to use colorful expressions in a figurative sense in reciting facts).

*D. The Issue of Defamatory Meaning*

Throughout the briefing and arguments on CBS's motion for summary judgment, it has become clear that, in addition to individual statements in the "Killer Wheel" program, Redco believes two defamatory implications were made in the context of the entire program.[5] These two allegedly defamatory insinuations were that multi-piece wheel rims are dangerous and that the manufacturers of such rims are unethical. We will first address the individual statements that Redco claims are defamatory.[6]

[5] The parties do not dispute the fact that "the literal accuracy of separate statements will not render a communication 'true' where . . . the implication of the communication as a whole [is] false." DUNLAP, 301 Pa. Super. Ct. at 493, 448 A.2d at 15 & n.9. Accordingly, a publisher is liable for any defamatory implications or innuendoes that arise from a set of statements or comments. *Id.*

[6] Because this is a motion for summary judgment, which is a proper motion in a defamatory action, we can render judgment for CBS only if no genuine issue as to any material fact exists. BROPHY, 281 Pa. Super. Ct. 588, 596, 422 A.2d 625, 631 (1980); Fed. R. Civ. Pa. 56(c). In examining the issue, we must view the evidence in the light most favorable to the non-moving party. BROPHY, 281 Pa. Super. Ct. at 596, 422 A.2d at 631-32. Redco claims various facts are disputed and, therefore, we will address Redco's claims as they arise in our discussion of the individual statements.

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*1. Multi-piece rims, unlike the rims on your car, kill people.*

First, this is a distortion by Redco of what the program stated or implied. Rather, the broadcast stated that multi-piece rims can kill people if the pieces separate and explode. This is a true fact, as Redco had admitted. Redco's Counterstatement of Material Facts, filed May 13, 1983 [hereinafter Redco's CMF]. ¶12.

*2. Multi-piece rims have killed more people than the Ford Pinto or the Firestone 500 tire.*

Redco claims this statement in the transcript can be considered true "only in the most superficial manner." Redco's Opposing Brief, at 28. To the contrary, this statement is absolutely true. Twenty-seven people died in accidents involving the Ford Pinto (where a rear end collision caused a sudden fire). Forty-one deaths occurred in accidents involving the Firestone 500 tires. Eighty-nine deaths occurred between 1970-1978 from multi-piece rim explosions. Simple arithmetic confirms the veracity of the above statement. While statistics may establish that less deaths occur per product with multi-piece rims than the Ford Pinto or the Firestone 500, CBS nevertheless broadcast a true statement. The comparison was merely a colorful way of emphasizing that deaths can occur with the use of multi-piece rims.

*3. CBS broadcast a "test film" of an exploding rim.*

Redco argues that the "test film" was misleading because the rim pieces had been altered to cause the explosion. Redco's point is without merit. Wallace clearly

stated that the explosion with the dummy was just a test film to demonstrate the force of a rim separation. Naturally, the pieces had to be altered to make this *test* film.

*4. When the pieces of a rim fall out of place, the pressure can cause them to explode.*

This statement is true. Redco's CMF, ¶10. What event causes them to fall out of place, whether improper service or the use of worn parts, does not change the truth of this statement.

*5. The known deaths and injuries caused by rim explosions are just the tip of the iceberg because no data are collected on these.*

This statement was made in the program by Kelley of the Insurance Institute. Transcript, at 4. Redco claims that the known deaths and injuries are the greater part of the iceberg, and not just the tip. Redco's Opposing Brief, at 31. Perhaps Redco is correct. Nevertheless, this statement is merely an opinion by Kelley couched in colorful language. As Redco admits, the Insurance Institute collected its data on rim separations by collecting newspaper clippings. No official method of collecting this data yet exists. Kelley gave his opinion that more accidents of this nature occur than people think. He made this statement to refute the industry's claim, rightly or wrongly, that these accidents are extremely rare. This opinion does not imply the existence of any nondisclosed defamatory facts.[7]

[7] Redco's claim that the Insurance Institute had a copy of a report, Phase IV, which contained more specific data concerning injuries caused by rim separations, does not make Kelley's statement defamatory. The statement still remains an opinion using hyperbole.

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*6. "And, says Kelley, the accidents often involve innocent bystanders." (Transcript, at 4).*

This statement was made by Wallace as he introduced a test film demonstrating what could happen to an unsuspecting vacationer as he places air in his camper tire. Redco asserts that the use of "often" implies that the statement is more than opinion but, rather, that it implies reliance on statistical data. We disagree. First, rim accidents do involve a good number of innocent bystanders. *See* Appendix to CBS's Supporting Brief [hereinafter CBS Appendix], Exhibit F, at 21-22. Secondly, the statement is mere opinion that does not imply the existence of any nondisclosed defamatory facts. The use of "often" does not cause the opinion to be defamatory.

*7. "And we know of these so-called freak accidents—which aren't so freak, it turns out...." (Transcript, at 4).*

*"And if that metal, for any reason, dislodges, it fires off like a shell out of a cannon into whatever is in the way, which is very often a serviceman's head." (Transcript, at 3).*

Kelley made both of the above statements during the broadcast. Redco argues that Kelley's comments imply that multi-piece rim separations are common; Redco claims they are rare. In support of this position, Redco cites Dr. Roger McCarthy, an averred authority on the topic of multi-piece tire rims, for the proposition that random lightning strikes kill ten times more people than all sevicing accidents with multi-piece rims. Transcript of Dr. McCarthy at 56.

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We do not refute Redco's claim that these tragic accidents are statistically rare. Nevertheless, these accidents do occur and it is proper for anyone to comment on this. Again, the statements were clearly Kelley's opinions stated colorfully. Kelley believes the accidents are not so "freak", and there are disclosed truthful facts to support such an opinion. Similarly, it is mere opinion to claim that these exploding rims "very often" fly at a serviceman's head. As the NHTSA's notice of termination of rulemaking reports, approximately three-fourths of all rim separations occur during servicing. 47 Fed. Reg. 8233. Accordingly, servicemen are more likely to be injured than innocent passersbies.

*8. The irony is that there is an identical wheel design in which all the metal is combined—the single-piece wheel. (Transcript, at 4).*

This statement by Kelley is not defamatory. Redco argues that CBS has untruthfully implied that single-piece rims are safer than multi-piece rims. CBS never asserted in the program that accidents cannot occur with single-piece rims. Rather, CBS merely made the point that with single-piece rims, the rims cannot separate into pieces like the multi-piece rims. The above-statement is true.

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*9. CBS falsely represented the opinion of Paul Hykes to support the contention that multi-piece rims are unsafe.*

Paul Hykes, a former chief engineer of the Budd Company in 1969, did not appear in the "Killer Wheel" broadcast. However, Wallace read part of a letter written by Hykes in 1969 which indicated that he believed the RH5° rim was dangerous and should be removed from the market place. Hykes Transcript, at 6. This letter was read to Bradley, a former Budd employee, to impeach Bradley's statement that the Budd people were satisfied that multi-piece rims, particularly the RH5° rim, were safe products. Bradley was visibly surprised by the Hykes' letter and swore he did not know of Hyke's opinions. Transcript, at 6.

In his deposition, Hykes testified that a *60 Minutes* employee telephoned him in 1981 in preparation of the "Killer Wheels" broadcast. The employee informed Hykes that he had a copy of the 1969 Hykes letter and that he would like Hykes to appear on the program. Hykes told the employee that the letter no longer represented his opinion of the RH5° rim. Hykes Transcript, at 8-10. Nevertheless, CBS did not include Hyke's disavowal of the 1969 letter in the broadcast. Redco now claims that this conduct of CBS falsely implied that the multi-piece rim industry realized that its rims were dangerous and should be removed from the market.

We will agree that CBS could have been fairer in presenting the issue of the dangerousness of milti-piece rims if it had included a segment on Hyke's disavowal of

his former view. However, we cannot agree that the manner of CBS's use of Hyke's letter was defamatory. The letter accurately reflected Hyke's opinion in 1969. Wallace only questioned Bradley about the letter to demonstrate that not all Budd personnel were satisfied with the RH5° rim in 1969. What was said in the broadcast concerning the letter was true, regardless of Hyke's disavowal ten years later.

*10. "Killer wheels—that's what many truck drivers and tire mechanics are calling some wheel rims. . . ." (Transcript, at 2).*

This statement was Wallace's opening remark in the broadcast. It is true that some people call the RH5° rim a killer wheel or suicide rim. CBS Appendix, Exhibit F, at 24. Whether "many" people call the RH5° a killer wheel is unknown. Regardless, the context of the statement reveals that Wallace's comment was a "catchy" way to open his story. The point was to state that some people who work with multi-piece rims consider them dangerous. The statement, viewed in context, cannot be interpreted as being defamatory.

In addition to the above-enumerated alleged defamatory statements, Redco has claimed that the facts contained in CBS's and Redco's statement of facts filed pursuant to Local Rule 401.4 are in dispute and prevent us from entering summary judgment. We find the statements are not truly disputed. A cursory review of CBS's statement and Redco's counterstatement reveals that Redco only has presented additional language to CBS's points and has not disputed them. Furthermore, if

any factual differences did exist, they concern aspects that are not material to the summary judgment motion. Summary judgment is proper only if there are no issues as to any *material* facts. Fed. R. Civ. P. 56(c).

In regard to Redco's claims of other material facts in dispute, *see* Affidavit of Donald Reihart, filed May 13, 1983, ¶2, subsections (b) and (c) have been discussed above. Subsection (d), that Redco was not asked to participate in the program, is absolutely irrelevant to the issues presented here. Subsections (e) and (f), which concern whether Redco is unethical, will be addressed below.

Finally, we observe that Redco's claim of material facts that need to be identified before summary judgment can be entered are also irrelevant to the issues presented here. While outtakes (the parts of an interview not broadcast) and CBS's blue sheet (the producer's proposed outline for a *60 Minutes* segment) could be helpful in proving CBS's alleged disregard for the truth, if the statements in the program and the implications thereof do not create an action in defamation and product disparagement, no such material facts need be identified. Accordingly, we will now turn to the two allegedly defamatory implications created by the "Killer Wheel" broadcast.

*E. The Alleged Defamatory Implications*

*1. Multi-piece rims are dangerous.*

Redco first claims that the broadcast defamatorily implied that multi-piece rims are dangerous. Without doubt, the *60 Minutes* segment did imply that multi-

piece rims can be dangerous. Although an implication or innuendo may be actionable, *Dunlap,* 301 Pa. Super. Ct. at 491, 448 A.2d at 15, an implication that is an opinion which does not suggest the existence of undisclosed defamatory or false facts does not create liability for defamation. *See* BRAIG, _____ Pa. Super. Ct. at _____, 456 A.2d at 1372; Restatement, Second, Torts §566 (1981).

The opinion or implication that multi-piece rims are dangerous rests upon disclosed truthful facts. These rims can explode and severely injure or kill people. Assuming that Redco's claim is true that these rims will not explode if they are properly serviced, it is obvious from the statistics that these rims have been improperly serviced with tragic results. The fact that rim separations are statistically rare in comparison to the large number of multi-piece rims on the highway does not lessen the possibly deadly effect of a rim separation. As CBS noted, any design of a product that causes the death of a single person may be considered dangerous.

It is true that CBS could have included more favorable comments and statistics about multi-piece rims than it did. But the courts cannot force the press to include certain information or to delete other information in addressing topics of public interest. The press must be free to make editorial decisions in presenting public issues for debate. "The First Amendment, said Judge Learned Hand, 'presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.' " NEW YORK TIMES, 376 U.S.

at 270, *quoting*, UNITED STATES v. ASSOCIATED PRESS, 52 F. Supp. 362, 372 (S.D. N.Y. L943). In light of this country's belief of the freedom of expression, the court cannot control how any individual presents his ideas and opinions.

This is not to say that the press can publish false and defamatory statements in reckless disregard of the truth. No person can. NEW YORK TIMES, 376 U.S. 254. Nevertheless, as long as statements are true or opinions do not imply undisclosed false facts, no liability can be imposed against the press or any individual for their publications. In this instance, no liability can be imposed against CBS for its opinion that multi-piece rims are dangerous in light of the true disclosed facts. Redco can disagree with the opinion, but it cannot recover for defamation or product disparagement on this point.

2. *Multi-piece rim manufacturers are unethical.*

Redco also contends that "'the 'gist' or 'sting' of the entire program is that [Redco] and the other manufacturers of multi-piece rims knowingly manufactured a dangerous product to obtain huge profits. Also [the manufacturers] are unconcerned that the product is dangerous and that it kills and maims people." Redco's Opposing Brief, at 36-37. CBS asserts, however, that even if such a meaning was implied by the broadcast, it is an opinion based upon fully disclosed facts. CBS's Reply Brief, at 22. We find that while a reasonable viewer of *60 Minutes* may have understood the broadcast to imply that multi-piece rim manufacturers cared more about money than lives, the opinion does not suggest that it is based upon any nondisclosed defamatory facts.

*Appendix G—District Court Opinion Entering Summary Judgment in Favor of CBS.*

CBS accurately cites at length cases finding that opinions criticizing the character or morals of a person or corporation, without more, are non-actionable under the principles of defamation. *See* CBS's Reply Brief and cases cited therein, at 22-25.

Only three parts of the broadcast actually apply to the implication that the manufacturers are unethical. The first part is in Wallace's opening comment that "this is also a story about the companies that make these wheels, about decisions by large corporations in weighing the costs and benefits of selling potentially dangerous products." Transcript, at 3. This certainly is not a defamatory statement and, taken in context with the entire broadcast, it does not imply the existence of any undisclosed false facts. In any corporate decision concerning the manufacturing of a product, the costs of various safety features must be balanced with the potential risks.[8]

The second section of the broadcast that addresses the issue of ethical conduct concerns Gary Gardner's opinion of multi-rim manufacturers. Gardner, an attorney who successfully represented a man severly injured by an exploding rim, stated that it would be expensive for the

[8] Indeed, even the federal regulatory agencies consider the costs and benefits to be gained in using their rulemaking powers. On February 22, 1982, the NHTSA terminated its rulemaking as to multi-piece rims because of the decreasing use of multi-piece rims and because of the estimated $600 million cost of implementing performance requirements. Realizing that the most likely costs would be $747 million, the agency concluded, "This substantial cost cannot be justified, in light of the agency's belief that the separations of multi-piece rims will decrease without the imposition of these costs." 47 Fed. Reg. 8232-34.

manufacturere to recall the millions of rims on the road to stamp a warning on the rim. He also implied that if the companies put a warning on new tire rims, law suits would be filed questioning why the old rims weren't recalled. His final opinion on the companies' inactivity was that it "would cost them money." Transcript, at 5.

This is clearly an opinion by Gardner. The opinion rests upon true disclosed facts. Warnings are not on the older rims and they are not being added to new rims. Wallace truthfully revealed that Firestone considered adding warning labels and that both Firestone and Goodyear even wrote sample warnings. Transcript, at 5. Nevertheless, these companies did not add the warnings. Additionally, Wallace reported that an engineering report at Goodyear's Motor Wheel Division admitted that any positive action by the manufacturers to remove multi-piece rims from the highway would result in more lawsuits and higher damages awards. Transcript, at 7.

Finally, Joan Claybrook, the former head of the NHTSA, opined that the responsibility for taking multi-piece rims off the road was on the manufacturers since the federal statute of limitations prevented the mandatory recall of most RH5° rims. In fact, she claimed that a voluntary recall was the only ethical thing to do. When Wallace asked Claybrook why she thought the manufacturers did not recall the rim, she said that a recall would acknowledge the existence of a defect and be used against them in product liability cases. She continued that in cases like this, it was a financial decision. Transcript, at 8.

Wallace then asked, "So, it comes down to money versus human life?" *Id.* Claybrook responded, "There's no question about that." *Id.* The program then concluded with Wallace questioning Bradley about the RH5° rim and asking, "And the accidents that have happened, you simply have to buy as part of the—part of the bargain, in a—in a sense?" Bradley answered, "This is the way life is." *Id.*

Again, we must conclude as a matter of law that the innuendo that manufacturers are unethical is merely opinion based on disclosed true facts. Certainly it is Claybrook's opinion that the manufacturers are concerned more about the financial aspects of a recall than they are concerned about the injuries. No undisclosed false facts appear to underly her opinion.

Redco has made much ado about the final question and answer in the broadcast by Wallace and Bradley. Redco claims that CBS edited Bradley's response to make it appear that manufacturers were unfeeling and unethical. Even if Redco is correct that the broadcast segment of the interview was edited, this does not create a defamatory statement. Rather, the segment makes an interesting conclusion. While we do not condone such editing, under the circumstances and the entire context of this program, we cannot find that the question and answer creates any action for defamation.

In conclusion, the program may have implied that multi-piece rims are dangerous and that the manufacturers are unethical. CBS did not broadcast a truly balanced presentation of the pluses and minuses of multi-piece rims. Nevertheless, the facts it presented

were truthful and the opinions it published were based on disclosed truthful facts. The question of public safety concerning a product necessarily results in others having varying opinions—certainly Redco has a different opinion. But the existence of conflicting opinions, with nothing more, does not create an action for defamation or product disparagement. Therefore, summary judgment must be entered on CBS's behalf on counts I and II of Redco's complaint.

## *III. REDCO'S COUNT III: INTENTIONAL INTERFERENCE WITH EXISTING AND PROSPECTIVE BUSINESS RELATIONS*

In its complaint, Redco averred that sometime after the two broadcasts of "Killer Wheels," its product liability insurance rose from $4.00 per $1,000.00 worth of coverage to $15.00 per $1,000.00 worth of coverage. Complaint, ¶¶43-50. Redco also averred that its gross monthly sales declined after each broadcast. *Id.*, ¶¶54-56. Redco thus claimed that CBS knew or should have known that its broadcast of "Killer Wheels" would damage existing business relationships and prevent the formation of business relationships as to sales and product liability insurance. *Id.*, ¶57. In making these allegations, Redco relies upon the same averments underlying its defamation and product disparagement counts. CBS seeks summary judgment on its behalf, asserting that a nondefamatory and nondisparaging publication is not legally improper tortious conduct to support Redco's count of intentional interference with business relations.

*Appendix G—District Court Opinion Entering Summary Judgment in Favor of CBS.*

In ADLER, BARISH, DANIELS, LEVEN & CRESKOFF v. EPSTEIN, 482 Pa. 416, 393 A.2d 1175 (1978), *cert. denied*, 444 U.S. 907 (1979), the Pennsylvania Supreme Court adopted the definition in §766 of the Restatement, Second, Torts for intentional interference with contractual relations.[9] The court was further guided by §767 for the factors to consider whether the conduct was "improper." Section 767 provides:

> In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors:
>
> (a) the nature of the actor's conduct,
>
> (b) the actor's motive,
>
> (c) the interests of the other with which the actor's conduct interferes,
>
> (d) the interests sought to be advanced by the actor,

---

[9] Section 766 provides:

> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other person for the pecuniary loss resulting to the other from the third person's failure to perform the contract.

Restatement, Second, Torts §766 (1979). Section 766B similarly defines intentional interference with *prospective* contractual relations.

(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,

(f) the proximity or remoteness of the actor's conduct to the interference and

(g) the relations between the parties.

Restatement, Second, Torts §767 (1979).

To prove this cause of action, Redco must establish that CBS's alleged interference with contractual relations was either desired by CBS or known by CBS to be a substantially certain result. *Id.*, Comment d. If CBS's conduct was not wrongful but merely to advance its own interest, the fact that CBS was aware it could interfere with Redco's contracts may be seen as an incidental consequence and the interference found not to be improper. Restatement, Second, Torts §766, Comment j.

Considering Redco's complaint and its arguments and applying the above factors, we conclude that Redco's third count must fail as a matter of law. CBS presented a broadcast on an issue of public concern, presenting true facts or unactionable opinions. Redco's entire claim of interference with contractual relations rests upon its claims of defamation and product disparagement. *See* Redco's Opposing Brief, at 50-51. We totally agree with Redco that an intentional interference with contractual relations cause of action can arise by overt acts of defamation and trade libel. Our lengthy discussion above concerning the merits of those claims, however, renders Redco's third count inoperative. Because the "Killer Wheels" segment was not defamatory and did not disparage Redco's products, we cannot find CBS to have intentionally and improperly interfered with Redco's business relations.

*Appendix G—District Court Opinion Entering Summary Judgment in Favor of CBS.*

## *IV. REDCO'S COUNT IV: CONSPIRACY*

Redco also alleged in its complaint that CBS and the Insurance Institute conspired to defame Redco and its products and to interfere with its existing and prospective business relations. Complaint ¶¶68-75. CBS properly maintains that Redco's civil conspiracy claim is unactionable if Redco cannot recover under its claims for defamation, trade libel, or interference with contractual relations. Redco, in essence, admits the soundness of this proposition in its brief in opposition to summary judgment with the following statement: "[I]t follows that if no action could have been maintained for the alleged defamation, no action can be maintained for the conspiracy to defame. 15A Corpus Juris *Conspiracy* §16, p. 647." Redco's Opposing Brief, at 52. Accordingly, Redco's civil conspiracy cause of action must fail in light of our findings above.[10]

An appropriate order will be entered.

R. DIXON HERMAN
R. Dixon Herman
*United States District Judge*

Dated: January 25th, 1984

[10] In light of our decision to grant summary judgment in CBS's favor, Redco's motion to compel discovery is now moot.

*Appendix G—District Court Opinion Entering Summary Judgment in Favor of CBS.*

IN THE
UNITED STATES DISTRICT COURT
For the Middle District of Pennsylvania

Filed
Harrisburg, Pa.
January 25 1984
Donald R. Berry, Clerk
Per MKG
Deputy Clerk

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REDCO CORPORATION,

*Plaintiff,*

vs.

CBS INC., and THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY,

*Defendants.*

---

Civil Action No. 82-0263.

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*Appendix G—District Court Opinion Entering Summary Judgment in Favor of CBS.*

*ORDER*

AND NOW, this 25th day of January, 1984, in accordance with the accompanying memorandum, IT IS HEREBY ORDERED that Defendant CBS, Inc.'s motion for summary judgment on counts I through IV of Plaintiff's complaint is granted. The Clerk of Court is directed to enter summary judgment in favor of Defendant CBS, Inc. and against Plaintiff upon the conclusion of this case.

IT IS FURTHER ORDERED that Plaintiff's motion to compel discovery is denied as being moot.

R. DIXON HERMAN
R. Dixon Herman
*United States District Judge*

## APPENDIX H

**District Court Opinion Entering Summary Judgment in Favor of IIHS**

IN THE UNITED STATES DISTRICT COURT
for the Middle District of Pennsylvania

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REDCO CORPORATION,

*Plaintiff,*

vs.

CBS, INC.; and THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY,

*Defendants.*

---

CIVIL ACTION NO. 82-0263

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FILED
HARRISBURG, PA.

JUL 16 1984

DONALD R. BERRY, CLERK
PER MKG
Deputy Clerk

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### MEMORANDUM

The procedural history of this case is well known to the parties and will not be repeated at length. Plaintiff, a manufacturer of multi-piece tire rims, filed this trade-libel, defamation suit in 1982 after Defendant, CBS, Inc., twice broadcast a *60 Minutes* segment entitled "Killer Wheels", which depicted the potential dangerousness of

multi-piece tire rims. In an extensive memorandum dated January 25, 1984, we granted CBS's motion for summary judgment, finding that the broadcast as a whole and the individual statements and opinions therein were truthful or based upon disclosed truthful facts. On March 19, 1984, we denied Plaintiff's motion for reconsideration.

Presently pending before us are the motions of Defendant Insurance Institute for Highway Safety [hereinafter Institute] for summary judgment and to strike Plaintiff's appendix and Plaintiff's motion for a continuance to supplement the record.

First, we will deny the Institute's motion to strike the appendix to Plaintiff's brief in opposition to the Institution's motion for summary judgment. The Institute raises some valid points as to the weaknesses in parts of the four affidavits submitted in the appendix. We believe that any such deficiencies, however, affect the weight to be given to the affidavits and should not prevent the document from being part of the record.

Secondly, we will deny Plaintiff's motion for a continuance to supplement the record. Plaintiff specifically seeks to take the deposition of Thomas W. Benson, an averred expert in the field of communication, including the area of television. Plaintiff, while conceding that the question of determining whether a broadcast is capable of defamatory meaning is for the court to decide, argues that the court should first consider Benson's scientific testimony concerning the psychological complexities that exist with the dissemination of information by television. Motion to Supplement Record, ¶¶13, 16-18. In the present case and in light of our January 25, 1984, memorandum regarding CBS's

summary judgment motion, we disagree. Benson's affidavit, Exhibit 1 of Plaintiff's appendix, is sufficient for the court's consideration of the Institute's motion for summary judgment.

Finally, we will grant the Institute's summary judgment motion. The Institute has noted correctly that our January 25, 1984, memorandum and order are the "law of the case." "Under the law of the case doctrine, once an issue is decided, it will not be relitigated in the same case, except in unusual circumstances." HAYMAN CASH REGISTER v. SAROKIN, 669 F.2d 162, 165 (3d Cir. 1982).

In our prior memorandum, we held that the "Killer Wheel" broadcast was not actionable for product disparagement or defamation since it consisted either of true facts, opinions based upon disclosed true facts, or matters of opinion which did not imply the existence of nondisclosed defamatory facts. BRAIG v. FIELD COMMUNICATIONS, _____ Pa. Super. Ct. _____, 456 A.2d 1366 (1983)(opinions based on true disclosed facts do not create liability for defamation); CORRABI v. CURTIS PUBLISHING CO., 441 Pa. 432, 273 A.2d 899 (1971)(truth is an absolute defense to alleged defamation); PIERCE v. CAPITAL CITIES COMMUNICATIONS, INC., 576 F.2d 495 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978)(use of colorful language in presenting facts or opinions does not render a communication defamatory). Although our opinion concerned *CBS's* motion for summary judgment, it addressed all of the allegations against the Institute. In its brief, the Institute has noted particular claims against itself and the court's conclusions. Institute's Brief in Support of Summary Judgment, at 4-7.

*Appendix H—District Court Opinion Entering Summary Judgment in Favor of IIHS.*

No unusual circumstances have arisen since our prior decision which justifies different conclusions. The affidavits submitted by Plaintiff do not alter our findings of fact and conclusions of law. These affidavits and Plaintiff's arguments establish only that others have different opinions as to the safety of multi-piece tire rims and the implications of the "Killer Wheel" broadcast. Regardless, it is the court that determines, as a matter of law, whether a communication is capable of defamatory meaning. *See* CORRABI, 441 Pa. at 442, 273 A.2d at 904. We have concluded that the broadcast,[1] as a whole and in its individual statements, did not defame Plaintiff or its product.[2]

R. DIXON HERMAN
R. Dixon Herman
UNITED STATES DISTRICT JUDGE

Dated: July 16th, 1984

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[1] In light of our prior extensive discussion of this case, we have refrained from repeating the facts in this memorandum. Yet, we must note our disagreement with certain proposed findings of fact offered by Plaintiff. The program did *not* suggest that *all* multi-piece rims kill people, that *all* multi-piece rims are inherently unpredictable and frequently lethal, that *all* such manufacturers are culpable in the making lethal rims, and that the industry or its representatives were heartless and "with something to kill." *See* Proposed Findings of Fact, ¶¶10, 12, 17, 21. We observed before that CBS did not present the most balanced picture of the positive and negative features of multi-piece rims versus single piece rims. Nevertheless, Plaintiff's harsh characterization of the program are excessive.

[2] For the reasons set forth in sections III and IV of the January 25, 1984, memorandum, summary judgment also will be entered in the Institute's favor as to the claims of interference with business relations and civil conspiracy.

*Appendix H—District Court Opinion Entering Summary Judgment in Favor of IIHS.*

IN THE UNITED STATES DISTRICT COURT
for the Middle District of Pennsylvania

---

REDCO CORPORATION,

*Plaintiff,*

vs.

CBS, INC.; and THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY,

*Defendants.*

---

CIVIL ACTION NO. 82-0263

---

FILED
HARRISBURG, PA.

JUL 16 1984

DONALD R. BERRY, CLERK
PER MKG
Deputy Clerk

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*Appendix H—District Court Opinion Entering Summary Judgment in Favor of IIHS.*

ORDER & JUDGMENT

AND NOW, this 16th day of July, 1984, in accordance with the accompanying memorandum, IT IS HEREBY ORDERED that:

1. The motion of the Insurance Institute for Highway Safety to strike Plaintiff's appendix to its brief in opposition of Defendant's motion for summary judgment is denied.

2. Redco Corporation's motion for a continuance to supplement the record is denied.

3. The motion for summary judgment by the Insurance Institute for Highway Safety is granted on counts I through IV of Plaintiff's complaint.

IT IS FURTHER ORDERED that judgment be and hereby is entered in favor of Defendants, CBS, Inc. and the Insurance Institute for Highway Safety, and against Plaintiff, Redco Corporation.

R. DIXON HERMAN
R. Dixon Herman
UNITED STATES DISTRICT JUDGE

# APPENDIX I
## Third Circuit Court of Appeals Opinion

UNITED STATES COURT OF APPEALS
For the Third Circuit

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No. 84-5525

---

REDCO CORPORATION,

*Appellant,*

v.

CBS, INC. and
THE INSURANCE INSTITUTE FOR
HIGHWAY SAFETY.

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On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 82-0263).

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Submitted Under Third Circuit Rule 12(6)
March 28, 1985

Before: ALDISERT, *Chief Judge,*
SLOVITER, *Circuit Judge,* and
STAPLETON, *District Judge**

(Opinion filed April 9, 1985)

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* Hon. Walter K. Stapleton, Chief Judge of the United States District Court for the District of Delaware, sitting by designation.

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## *OPINION OF THE COURT*

SLOVITER, *Circuit Judge.*

Redco Corp. filed a complaint against CBS, Inc. and the Insurance Institute for Highway Safety (IIHS), alleging trade libel and disparagement, defamation, intentional interference with existing and prospective business relations, and conspiracy. The dispute arose out of a CBS 60 Minutes segment entitled "Killer Wheels" about the use and safety of multi-piece tire rims used on trucks and buses. The program, which did not mention Redco by name, reported that people had been injured and killed when pieces of metal from the rim separated, causing the metal to shoot outward with explosive force. The program also addressed the manufacturers' unwillingness to recall, stop manufacturing, or place warnings on the rims.

Redco alleged that CBS used statements, innuendos, overstatements, unfair comparisons, and distorted analogies that were false, misleading and defamatory as applied to Redco and its product, specifically identifying several of such statements. In addition, Redco alleged that a film prepared by IIHS used a severely altered multi-piece rim and was prepared for the sole purpose of making the rim explode.

IIHS was sued for providing CBS with much of the evidence relied upon during the broadcast, such as the test film and the names of accident victims. Redco alleged that IIHS knew from its own in-house engineer that it had no sound technical basis to conclude that multi-piece rims should be withdrawn from the market, and that its data was not collected scientifically but rather in an effort to achieve the "predetermined result that multi-piece rims are unsafe."

Redco also alleged that defendants interfered with existing and prospective business relations because its product liability insurance premiums increased substantially and its sales dropped following the broadcasts of the program and that IIHS and CBS conspired to prepare, edit, and broadcast the program in an unlawful fashion with the purpose of effecting the withdrawal of multi-piece rims from the market.

The district court granted summary judgment in favor of both defendants. We now affirm.

In Pennsylvania, which has adopted the relevant sections of the Restatement, a statement is defamatory "if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Corabi v. Curtiss Publishing Co.*, 441 Pa. 432, 442, 273 A.2d 899, 904 (1971); *Cosgrove Studio and Camera Shop, Inc. v. Pane*, 408 Pa. 314, 318, 182 A.2d 751, 753 (1962); Restatement (Second) of Torts §559. An action for trade libel lies when the publisher disparages plaintiff's property and should recognize that pecuniary loss from the conduct of third persons is the likely result. Restatement (Second) of Torts §626. *See also Cosgrove*, 408 Pa. at 319, 182 A.2d at 754 (defamation affecting business interests is actionable). The court's function is to decide if a communication is capable of a defamatory meaning and the jury's function is to determine whether the communication was so understood by its recipient. *Corabi*, 441 Pa. 442, 273 A.2d at 904; Restatement §614.

The district court made a detailed analysis of each of the individual, allegedly defamatory statements, and concluded that each one was either true or non-actionable

because it was a statement of opinion. Redco objects to the district court's characterization of the defamatory meaning of the broadcast by reference to the specific words used. It asserts that the court should have found that statements such as "multi-piece tire rims kill people" could reasonably be understood to mean "Redco tire rims kill people". Although a party defamed need not be specifically named, if pointed to by description or circumstances tending to identify it, *Cosgrove*, 408 Pa. at 319, 182 A.2d at 753, Redco's construction of the above statements as applicable to it is unreasonable.

The court may determine that allegedly defamatory statements are true if a reasonable jury could come to only one conclusion. *See, e.g.*, Restatement (Second) of Torts §617(b) and Comment b. Redco admits that some people have been killed in accidents with multi-piece wheel rims, and it admits that its wheel rims have injured people. The fact that at the time of the broadcast, no one had died from injuries sustained in a Redco wheel rim accident does not make the general assertions about multi-piece rims untrue. Nor are the statements rendered untrue because CBS could have, but chose not to, include information that was more favorable to the manufacturers.

The district court also did not err in characterizing other statements in the broadcast as non-actionable opinions. In *Gertz v. Welch*, 418 U.S. 323 (1974), the Court stated:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

*Id.* at 339-40. Although there may be no such thing as a false opinion, an opinion which is unfounded reveals its lack of merit when the opinion-holder discloses the factual basis for the idea. If the disclosed facts are true and the opinion is defamatory, a listener may choose to accept or reject it on the basis of an independent evaluation of the facts. However, if an opinion is stated in a manner that implies that it draws unstated facts for its basis, the listener is unble to make an evaluation of the soundness of the opinion. In such circumstances, if the underlying facts are false, the Constitution does not protect the opinion. *See* Restatement (Second) of Torts §566A. We agree with the district court that the factual bases for all stated opinions were adequately disclosed and therefore these statements were not actionable.

In addition, other statements are protected because they merely involve the use of colorful language and are not defamatory. It is well settled that the use of catchy phrases or hyperbole does not necessarily render statements defamatory that would otherwise be non-actionable. *See Old Dominion Branch No. 496 v. Austin,* 418 U.S. 264 (1974); *Greenbelt Cooperative Publishing Association v. Bresler,* 398 U.S. 6 (1970). The district court did not err in holding that the remaining statements challenged by Redco fall within the rules protecting hyperbole.

The district court also considered whether two broader implications in the broadcast were defamatory: (1) multi-piece rims are dangerous; (2) multi-piece rim manufacturers are unethical. Even assuming the truth of Redco's claim that the rims would not explode if properly serviced, numerous accidents have happened and therefore the implication the product was dangerous

cannot be found to be false. In addition, dangerousness is merely an expression of opinion and therefore cannot be a basis for recovery. Similarly, Redco's claim that it was defamed by the implication that manufacturers are unethical is also unfounded. The portions of the broadcast which could have given rise to such an implication were expressions of opinion and, viewed in the context of the entire program, the statements create no basis for a defamation action.

The issues discussed in the broadcast were matters of public concern, the facts disclosed were true and the program adequately disclosed the basis for the opinions expressed. Therefore, we conclude that the district court committed no error in holding that as a matter of law Redco could not recover for defamation or product disparagement based on the broadcast.

Since neither CBS nor IIHS can be found liable for defamation, the intentional interference with contractual relations count is not actionable because there is no basis for finding that their actions were "improper", *see Adler, Barrish, Daniels, Levin, and Krescoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175 (1978), *cert. denied*, 444 U.S. 907 (1979) (conduct is improper if taken in the absence of a privilege or justification), or that they unlawfully conspired.

We have considered all of the remaining contentions of Redco and find them unpersuasive. Accordingly, the judgment of the district court will be affirmed.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

## APPENDIX J

### First and Fifth Amendments to the U. S. Constitution

*AMENDMENT 1*

*Religious and political freedom.*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

*AMENDMENT 5*

*Criminal actions—Provisions concerning—Due process of law and just compensation clauses.*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## APPENDIX K

### Pennsylvania Statutes 42 Pa. C.S.A. §8343(a)(b)

**§8343. Burden of proof**

**(a) Burden of plaintiff.**—In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

(1) The defamatory character of the communication.

(2) Its publication by the defendant.

(3) Its application to the plaintiff.

(4) The understanding by the recipient of its defamatory meaning.

(5) The understanding by the recipient of it as intended to be applied to the plaintiff.

(6) Special harm resulting to the plaintiff from its publication.

(7) Abuse of a conditionally privileged occasion.

**(b) Burden of defendant.**—In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

(1) The truth of the defamatory communication.

(2) The privileged character of the occasion on which it was published.

(3) The character of the subject matter of defamatory comment as of public concern.

1976, July 9, P.L. 586, No. 142, §2, effective June 27, 1978.

## APPENDIX L

***Hepps v. Philadelphia Newspapers, Inc.***
**reported decision**

[374] MAURICE S. HEPPS, et al.

vs.

PHILADELPHIA NEWSPAPERS, INC., WILLIAM ECENBARGER, AND WILLIAM LAMBERT.

Appeal of Maurice S. Hepps, et al.

Supreme Court of Pennsylvania.

Argued April 9, 1984.

Decided Dec. 14, 1984.

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Private individuals brought libel action against newspaper publisher and reporters. The Court of Common Pleas of Chester County, No. 36 May Term, 1976, entered judgment in favor of defendants on general verdict, and plaintiffs appealed challenging the trial court's decision to instruct the jury that the plaintiffs bore the burden of proving the falsity of the defamatory publication. The Supreme Court, No. 18 E.D. Appeal Dkt. 1983, Nix, C.J., held that: (1) presuming the falsity of the defamatory material for which a private individual brought a civil libel suit for damages and imposing upon the defendant the burden of proving the truth of the defamatory state- [375] ments is not violative of the First Amendment, and (2) evidence was insufficient to establish actual malice so as to raise a triable issue of fact and thus trial court properly withdrew question of punitive damages from the jury's consideration.

Reversed.

*Appendix L—Hepps v. Philadelphia Newspapers, Inc. reported decision.*

**1. Libel and Slander—101(1)**

In actions for defamation, the general character or reputation of the plaintiff is presumed to be good.

**2. Libel and Slander—110(3)**

Character evidence in defamation cases follows the general rule that in civil proceedings evidence of character is inadmissible unless directly in issue and even then evidence of good character is not admissible unless it is attacked by evidence to the contrary, it being presumed to be good absent proof that it is bad.

**3. Libel and Slander—54**

Although falsity of the defamatory words is presumed, proof of the truth of the words by the defendant is a complete and absolute defense to a civil action for libel.

**4. Libel and Slander—30**

Since truth is an absolute defense, whether the defamatory statements were made willfully or negligently, civil action in libel is only actionable, at least in theory, when the defamatory statement is also false.

**5. Libel and Slander—101(5)**

Although falsity is an element of a defamation action, the burden is placed upon the alleged defamer to establish the truth of those accusations and the truth will be presumed in the absence of proof to the contrary.

**6. Libel and Slander—30**

A civil libel action arises not only because the words injured the reputation of another, but also because the publication is false.

**7. Libel and Slander—30**

Defamatory nature of the comment, regardless of how injurious to the reputation, is not alone actionable.

**8. Libel and Slander—34**

Even though false, published materials may not give rise to liability when it is privileged.

**9. Libel and Slander—50½**

The publisher of the defamatory falsehood is not a guarantor of the truth of the privileged materials published although the privilege is abused if the defamatory statement is negligently published.

**10. Libel and Slander—48(1)**

"Public figure" is one who through fame, notoriety or achievements, or through voluntary participation in resolution of important public questions, seeks to influence society.

See publication Words and Phrases for other judicial constructions and definitions.

**11. Libel and Slander—48(1)**

The characteristics of a "public figure" deemed to justify the application of the actual malice standard are that the

public figure invites public attention, criticism and comment, and, usually has access to the media to refute defamatory publicity.

**12. Libel and Slander—48(1)**

"Involuntary public figure" is an individual who has not attained fame or notoriety and who is thrust into an event of general public interest involuntarily.

**13. Constitutional Law—90.1(5)**

The only restraint upon the states mandated by the First Amendment in civil actions for defamatory falsehood brought by a private figure for compensatory damages is that they may not impose liability upon the defendant without fault. U.S. C.A. Const.Amends. 1, 14.

**14. Libel and Slander—50½**

If a private figure plaintiff is to maintain any defamation cause of action at all, he must minimally establish the negligence [376] on part of the publisher and in doing so, he has by that very action proved any possible conditional privilege was abused.

**15. Libel and Slander—50½, 51(1)**

The inability of the publisher to overcome the presumption of falsity of the defamatory statement will not insure recovery by the plaintiff as recovery is dependent upon plaintiff's ability to establish malice or negligence on the part of the publisher in disseminating the defamatory falsehood.

**16. Negligence—16**

Strict liability is a policy determination that injury flowing from a set of circumstances will be compensable regardless of the blamelessness of the conduct of defendant.

**17. Constitutional Law—90.1(5)**

Presuming the falsity of the defamatory material for which a private individual commenced a civil libel suit for compensatory damages, and imposing upon the defendant the burden of proving, at its option, the truth as an absolute defense to the action is not violative of the First Amendment. U.S.C.A. Const.Amend. 1; 42 Pa.C.S.A. §8343(b)(1).

**18. Libel and Slander—120(2)**

To justify punitive damages in civil libel action, the plaintiff is called upon to satisfy the actual malice test.

**19. Libel and Slander--123(10)**

Evidence in civil libel suit was insufficient to establish actual malice so as to raise triable issue of fact and thus, trial court properly withdrew punitive damages issue from jury's consideration.

**20. Libel and Slander—123(10)**

Trial court ruling withdrawing the punitive damage issue from the jury in a civil libel suit should be entered only in a clear case.

*Appendix L—Hepps v. Philadelphia Newspapers, Inc. reported decision.*

**21. Libel and Slander—104(1)**

The publisher's hatred, spite, hostility or deliberated intention to harm the plaintiff is not sufficiently probative of his knowledge of falsity or awareness of probable falsity as to allow its admissibility in civil libel suit when actual malice is an issue, but once established, the enumerated elements would be admissible.

**22. Libel and Slander—51(1)**

A publisher's failure to investigate in itself is insufficient to establish actual malice.

**23. Libel and Slander—51(1)**

"Actual malice" can be established either by proving the publication was made with knowledge of its falsity of its contents or with reckless disregard of whether it was false or not.

See publication Words and Phrases for other judicial constructions and definitions.

**24. Libel and Slander—51(1)**

When the plaintiff attempts to prove actual malice of the publisher by proving the publication was made with knowledge of the falsity, the plaintiff must show not only the falsity of the statement, but, in addition, establish that publisher's knowledge of that falsity at the time of publication.

*Appendix L—Hepps v. Philadelphia Newspapers, Inc. reported decision.*

25. **Libel and Slander--112(2)**

The presumption of falsity available to the plaintiff when the negligence standard is applicable is of no assistance in meeting the burden of proving actual malice for purposes of imposing punitive damages upon the publisher.

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William H. Lamb, Edwin P. Rome, Ronald H. Surkin, Philadelphia, for appellants.

David H. Marion, Richard L. Cantor, West Chester, for appellees.

OPINION

NIX, Chief Justice.

The instant civil libel action resulted from a series of five "investigative" articles appearing in *The Philadelphia Inquirer* which purported to link Maurice S. [377] Hepps, General Programming, Inc. and a number of independent corporate entities who operated beer and beverage distributorships as franchises of General Programming, Inc. to certain named "underworld" figures and to organized crime generally. Maurice Hepps, the individual plaintiff-appellant was the principle stockholder of the corporate plaintiff-appellant, General Programming, Inc. ("General"). General owns the trademarks "Thrifty Beverage" and "Brewer's Outlet," and licenses such marks and provides management and consultation services to licensees. The remaining corporate and individual plaintiff-appellants,

approximately nineteen in number, are licensees of General. As a result of these articles, the plaintiff-appellants instituted a civil action in libel against Philadelphia Newspapers, Inc., the publisher of the newspaper in question, and William Ecenbarger and William Lambert, the reporters who prepared the series of articles.

After a six-week trial, the jury returned a general verdict in favor of defendant-appellees. Plaintiff-appellants based their challenge to the judgment rendered below upon the trial court's decision to instruct the jury that the plaintiff bears the burden of proving the falsity of the defamatory publication. This instruction was given after the trial court had ruled that 42 Pa.C.S. §8343(b)(1) was unconstitutional in that it requires the defendant in a civil libel suit to establish the truth of the defamatory publication by way of an absolute defense to the action. Plaintiff-appellants also appeal the trial court's dismissal of their claim for punitive damages. This direct appeal seeking the award of a new trial is entertained by this Court pursuant to 42 Pa.C.S. §722(7).

I.

It has long been the decisional law of this Commonwealth that truth is a complete defense to a civil action for libel, and that the burden of proving truth rests upon the defendant. *Matson v. Margiotti*, 371 Pa. 188, 88 A.2d 892 (1952); *Kilian v. Doubleday & Co., Inc.*, 367 Pa. 117, 79 A.2d 657 (1951); *Montgomery v. Dennison*, 363 Pa. 255, 69 A.2d 520 (1949); *Mulderig v.*

*Wilkes Barre Times*, 215 Pa. 470, 64 A. 636 (1906); *Burkhart v. North American Co.*, 214 Pa. 39, 63 A. 410 (1906); *Bryant v. Pittsburgh Times*, 192 Pa. 585, 44 A. 251 (1899); *Wood v. Boyle*, 177 Pa. 620, 35 A. 853 (1896); *Collins v. Dispatch Pub. Co.*, 152 Pa. 187, 25 A. 546 (1893); *Conroy v. Pittsburgh Times*, 139 Pa. 334, 21 A. 154 (1891); *McLenahan v. Andrews*, 135 Pa. 383, 19 A. 1039 (1890); *Press Co. v. Stewart*, 119 Pa. 584, 14 A. 51 (1888); *Rowand v. DeCamp*, 96 Pa. 493 (1880); *Barr v. Moore*, 87 Pa. 385 (1878); *Burford v. Wible*, 32 Pa. 95 (1858); *Chapman v. Calder*, 14 Pa. 365 (1850); *Steinman v. McWilliams*, 6 Pa. 170 (1874). In 1953, this common law principle was codified in the Act of August 21, 1953, P.L. 1291, No. 363, §1(2)(a), 12 P.S. §1584a(b)(1) (Repealed 1978), which provided:

> In an action for defamation, the defendant has the burden of proving, when the issue is properly raised;
>
> The truth of the defamatory communication.

The provision was reenacted in the Judicial Code on July 9, 1976, effective June 27, 1978, 42 Pa.C.S. §8343(b)(1):

> Burden of defendant.—In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:
>
> The truth of the defamatory communication.
>
> . . . . .

Thus the section now being challenged is the codification of the decisional law as it has developed over the last century in this Commonwealth on this subject. We are now called upon to determine whether section 8343(b)(1), which places upon the defendant in a libel suit

the burden of proving the truth of defamatory statements, is constitutionally infirm in view of the relatively recent interpretations of the first Amendment of the United States Constitution as expressed by the United States Su- [378] preme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), and its progeny. *See, e.g., Bose Corp. v. Consumers Union of U.S., Inc.*, _____ U.S. _____, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984); *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 99 S.Ct. 2701, 61 L.Ed.2d 450 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411 (1979); *Herbert v. Lando*, 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971); *Time, Inc. v. Pape*, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed. 45 (1971); *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971); *Greenbelt Cooperative Publishing Ass'n. v. Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970); *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968); *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967).

*Appendix L—Hepps v. Philadelphia Newspapers, Inc. reported decision.*

A.

[1] Before examining the United States Supreme Court decisions relating to the impact of the First Amendment upon this area of the law, it is instructive to briefly review the Pennsylvania law of libel as it has developed over the years. The underlying premise concerning the character of the defamed individual is the principle that any man accused of wrong-doing is presumed innocent until proven guilty. The decisions reasoned this principle trancended the criminal law and was equally applicable to the ordinary affairs of life. *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 448-49, 273 A.2d 899, 907 (1971). *Montgomery v. Dennison, supra*, 363 Pa. at 263 n. 2, 69 A.2d at 525 n. 2. Based upon this premise we developed the rule that in actions for defamation, the general character or reputation of the plaintiff is presumed to be good. *Corabi, supra*, 441 Pa. at 449, 273 A.2d at 908; *Klumph v. Dunn*, 66 Pa. 141, 147 (1870); *Hartranft v. Hesser*, 34 Pa. 117, 119 (1859); *Chubb v. Gsell*, 34 Pa. 114, 116 (1859). Since the gravamen of defamation is that the words uttered or written tend to harm the reputation, a consequence of the rule presuming the good reputation of the plaintiff was a presumption of the falsity of the defamatory words. *Corabi, supra; Hartranft v. Hesser, supra.*

[2] Evidentiary considerations have also been offered to justify the presumption. As noted by this Court in *Corabi*:

> Moreover, it is manifestly the fair thing to place upon the defendant the burden of proving truth: *Montgomery v. Dennison*, supra [363 Pa.] n. 2 at 263

> [69 A.2d 520]; 9 Wigmore, Evidence §2486, at 276 (3d ed. 1940). Although not invariably so, it is preferable to place the burden of proof upon the party having in form the affirmative allegation and/or upon the party who presumably has peculiar means of knowledge of the particular fact in issue: See Wigmore, Evidence §2486, supra. For example, in the context of libel, if the written communication accuses plaintiff of being a murderess, a burglar or a prostitute, the defendant knows precisely what particular event he is referring to and the source of his information, whereas the plaintiff, not knowing these facts, would experience great difficulty in refuting these general charges by showing their falsity.
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> *Id.* 441 Pa. at 450-451, 273 A.2d at 908-09 (footnotes omitted).

Particularly, where the accusation is totally general and without the specificity necessary for a response, the absence of such a presumption would force the plaintiff in the unenviable position of proving the negative. *Corabi, supra* at 450, 273 A.2d at [379] 907; *Conroy v. Pittsburgh Times, supra,* 139 Pa. at 339, 21 A. at 156.[1]

[1] Another rationale offered to support the presumption of the good character or innocence of the plaintiff was the view that it would be unduly prejudicial to the defendant to permit the plaintiff to prove his general good character in the plaintiff's case-in-chief. In *Hartranft v. Hesser,* 34 Pa. 117, 119 (1859), it was stated that the plaintiff is not permitted to prove his general good character because to permit such evidence would be to take advantage of the defendant who was unapprised of its nature or to raise a collateral issue not made by the pleadings in the case. *Id.* Thus, character evidence in defamation cases follows the general rule that "In civil proceedings, evidence of

(Footnote continued on following page)

[3-7] Although falsity of the defamatory words is presumed, proof of the truth of the words by the defendant is a complete and absolute defense to a civil action for libel. *Pierce v. Cities Communications, Inc.*, 576 F.2d 495, 507 (3d Cir.) *cert. denied*, 439 U.S. 861, 99 S.Ct. 181, 58 L.Ed.2d 170 (1978); *Lowenschuss v. West Publishing Co.*, 542 F.2d 180, 184 (3d Cir.1976); *Keddie v. Pennsylvania State University*, 412 F.Supp. 1264 (M.D.Pa.1976); *Fram v. Yellow Cab Co. of Pittsburgh*, 380 F.Supp. 1314 (W.D.Pa.1974); *Corabi, supra*, 441 Pa. at 449, 273 A.2d at 907; *Schonek v. WJAC, Inc.*, 436 Pa. 78, 84, 258 A.2d 504, 507 (1969); *Schnabel v. Meredith*, 378 Pa. 609, 612, 107 A.2d 860, 862 (1954); *Montgomery v. Dennison, supra*, 363 Pa. at 264, 69 A.2d at 525; *Hartranft v. Hesser, supra* at 119; *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa.Super. 475, 485-86, 448 A.2d 6, 11 (1982); *Badami v. Dimson*, 226 Pa.Super. 75, 77, 310 A.2d 298, 300 (1973); Restatement (Second) of Torts §581A, comment b, at 235-36 (1976). Under our law, since truth is an absolute defense, whether the defamatory statements were made willfully or negligently, Restatement (First) of Torts §582 comment (a) (1938), a civil action in libel is only actionable, at least

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(Footnote continued from preceding page)

character is inadmissible unless directly in issue or involved in the nature of the proceedings, and *even then evidence of good character is not admissible unless and until it is attacked by evidence to the contrary, it being presumed to be good in absence of proof that it is bad.*" 1 G. Henry, Pennsylvania Evidence §152 (1953) (emphasis added) *citing Costello v. Long*, 62 Pa.Super. 13, 17 (1915); *Burkhart v. North American Co.*, 214 Pa. 39, 42, 63 A. 410, 411 (1906); *Clark v. North American Co.*, 203 Pa. 346, 353, 53 A. 237, 239 (1902); *Chubb v. Gsell*, 34 Pa. 114, 116 (1859). *See also* 22 P.L.E. *Libel and Slander* §57 (1959).

in theory, where the defamatory statement is also false.[2] *Rosenbloom, supra*, 403 U.S. at 37, 91 S.Ct. at 1816; *Harbridge v. Greyhound Lines, Inc.*, 294 F.Supp. 1059, 1063 (E.D.Pa.1969); *Corabi, supra*, 441 Pa. at 448-49, 273 A.2d at 908; *Young v. Geiske*, 209 Pa. 515, 519, 58 A. 887, 888 (1904); *Wood v. Boyle, supra*, 177 Pa. at 631, 35 A. at 854; *Collins v. Dispatch Pub. Co., supra*, 152 Pa. at 189-90, 25 A. at 547; *Barr v. Moore, supra* at 391; Restatement (First) of Torts §558 (1938). The cause of action arises not only because the words injure the reputation of another, but also because the publication is false. The defamatory nature of the comment, regardless of how injurious to the reputation, is not alone actionable. *Rosenbloom, supra*, 403 U.S. at 37, 91 S.Ct. at 1816; *Harbridge v. Greyhound Lines, Inc., supra* at 1063; *Corabi, supra*, 441 Pa. at 448-49, 273 A.2d at 908; *Young v. Geishe, supra*, 209 Pa. at 519, 58 A. at 888; *Wood v. Boyle, supra*, 177 Pa. at 631, 35 A. at 853; *Collins v. Dispatch Pub. Co., supra*, 152 Pa. at 189-90, 25 A. at 547; *Barr v. Moore, supra* at 391.

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[2] In *Corabi* it is stated that falsity is not an element of the civil action of libel under our law. *Id.*, 441 Pa. at 449, 273 A.2d at 908. This statement is troubling. The fact that an element is presumed and can only be overcome by affirmative evidence establishing the contrary, does not remove it as an element of the cause of action. If such was the case, there would be no need for the presumption in the first instance. *See Waugh v. Commonwealth*, 394 Pa. 166, 146 A.2d 297 (1958); *Waters v. New Amsterdam Casualty Co.*, 393 Pa. 247, 144 A.2d 354 (1958); *MacDonald v. Pennsylvania R. Co.*, 348 Pa. 558, 36 A.2d 492 (1944); *Smith v. Kingsley*, 331 Pa. 10, 200 A. 11 (1938); *Watkins v. Prudential Ins. Co. of America*, 315 Pa. 497, 173 A. 644 (1934). A more accurate statement of our law is that, although falsity is an element of the cause of action, we have concluded that the burden should be placed upon the alleged defamer to establish the truth of these accusations and will presume it in the absence of proof to the contrary.

*Appendix L—Hepps v. Philadelphia Newspapers, Inc. reported decision.*

[8, 9] Even though false, published materials may not give rise to liability where it is privileged. The publisher of the defamatory falsehood under the traditional Pennsylvania law of defamation is not a guarantor of the truth of the materials published. However, privilege is abused if the defamatory statement is negligently published. In *Montgomery v. Philadelphia*, 392 Pa. 178, 140 A.2d 100 (1958), it was stated that the defense of privilege in cases of defamation "rests upon the . . . idea, that conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." 392 Pa. at 181, 140 A.2d at 102, *quoting* W. Prosser, *Torts* §607 (2d ed. 1955). Thus, truth was never the *only* defense to a civil libel action in Pennsylvania. This concept was clearly set out in *Diamond v. Krasnow*, 136 Pa.Super. 68, 7 A.2d 65 (1939), which stated that the immunity of a privileged communication "is an exception to the general rule that nothing short of the truth is a defense. . . ." *Id.* at 76, 7 A.2d at 69, *citing Stevenson v. Morris*, 288 Pa. 405, 136 A. 234 (1927); *Hartman v. Hyman*, 287 Pa. 78, 134 A. 486 (1926); *Montgomery v. New Era Printing Co.*, 229 Pa. 165, 78 A. 85 (1910); *Mulderig v. Wilkes-Barre Times, supra; McGaw v. Hamilton*, 184 Pa. 108, 39 A. 4 (1898); *Conroy v. Pittsburgh Times, supra; Russell v. Pa. Mut. Life Ins. Co.*, 118 Pa.Super. 351, 179 A. 798 (1935); *McGerary v. Leader Publish. Co.*, 52 Pa.Super. 35 (1912); *Collins v. News Co.*, 6 Pa.Super. 330 (1898).

Nonetheless, tradition, evidentiary considerations, or any other state determined policy, cannot support the presumption of falsity, if it is offensive to constitutional mandate. Judge Sugerman reviewed the pertinent United States Supreme Court decisions and concluded that we are compelled to reject the rule that the defendant bears the burden of proving truth. We are unquestionably bound by the United States Supreme Court's interpretation of the provisions of the Federal Constitution. *First Pennsylvania Bank v. Lancaster County Tax Claim Bd.*, 504 Pa. 179, _____, 470 A.2d 938, 941 (1983); *Commonwealth v. Ware*, 446 Pa. 52, 56, 284 A.2d 700, 702 (1971), *cert. denied*, 406 U.S. 910, 92 S.Ct. 1606, 31 L.Ed.2d 821 (1972); *Commonwealth ex rel. Banks v. Hendrick*, 430 Pa. 575, 578, 243 A.2d 438, 439 (1968); *Commonwealth v. Robin*, 421 Pa. 70, 72, 218 A.2d 546, 546 (1966); *Carolene Products Co. v. Harter*, 329 Pa. 49, 55, 197 A. 627, 630 (1938). We will therefore review those decisions and assess Judge Sugerman's conclusions as to their impact under the facts of this case.

B.

At the outset of the discussion of the United States Supreme Court decisions, it must be remembered that the Court was attempting to define the extent of the freedom of expression provided under the First Amendment, and made applicable to the state through the Fourteenth Amendment, as it relates to civil actions for libel under state law. A subsidiary objective was the formulation of a rule that would satisfy the protection found to be constitutionally required. In the words of that Court, they were struggling "to define the proper

accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz, supra,* 418 U.S. at 325, 94 S.Ct. at 3000. Our purpose for reviewing these decisions at this time is to determine whether our rule of state libel law presuming the good reputation of the plaintiffs and setting up truth as a defense to be established by the defendant runs counter to the present interpretations of the First Amendment mandates.

In *New York Times, supra,* the Supreme Court stated that state law of civil libel "can claim no talismanic immunity from constitutional limitations". *Id.* 376 U.S. at 269, 84 S.Ct. at 720. That Court then proceeded to conclude that the central meaning of the First Amendment, enforced upon [381] the states through the Fourteenth Amendment, required a privilege of fair comment and honest mistake of fact. The majority held that a public official is prohibited "from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not".[3] *Id.* at 279-80, 84 S.Ct. at 725-26.

In the context of criticism of public officials the Court rejected the argument that the availability of the defense of truth, where the burden of establishing it is on the defendant, satisfies the constitutional concerns involved.

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[3] The *New York Times* decision was without dissent. The three concurring justices would have required an absolute, unconditional privilege to critique official conduct. *New York Times v. Sullivan,* 376 U.S. 254, 297, 84 S.Ct. 710, 735, 11 L.Ed.2d 686 (1964) (Black, J., concurring, joined by Douglas, J.); *Id.* at 304-05, 84 S.Ct. at 738-39 (Goldberg, J., concurring, joined by Douglas, J.).

> Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone". (citations omitted) The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.
>
> *Id.* at 279, 84 S.Ct. at 725 (citations omitted).

Although *New York Times* made it clear that no longer would the former view that libel was speech not protected by the First Amendment be without exception, many questions were still left unanswered by that decision as to the full extent of the constitutional privilege developed therein. The *New York Times*, decision did not expressly state that the constitutional protection required the shifting of the burden of proving falsity to the plaintiff in establishing a *prima facie* case. Nor did the reasoning of that decision necessarily implicitly compel such a result. *See Corabi, supra,* 441 Pa. at 468 n. 22, 273 A.2d at 917 n. 22. In *New York Times,* the Court had no occasion to consider the question of who should bear the burden of proving falsity when it is in fact in issue in the litigation. To the contrary, the Court in *New York Times* was concerned with stressing "[t]hat erroneous statement is inevitable in free debate, and that it must be protected if the freedoms or expression are to have the 'breathing space'

that they need to survive". *Id.* 376 U.S. at 271-72, 84 S.Ct. at 721-22.[4]

[10-12] The major question commanding the attention of the Court in subsequent decisions was the extent to which the *New York Times* rule should apply. In 1967, the Court extended the *New York* [382] *Times* rule to public figures in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). In those cases the plaintiffs were not public officials as was the case in *New York Times*, but rather individuals who had attracted public attention either through the positions they held in society or their

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[4] We note that several of the decisions of that Court have stated the *New York Times* holding as requiring proof of falsity as part of the plaintiff's *prima facie* case. For instance in *Garrison v. Louisiana*, 379 U.S. 64, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964), Justice Brennan stated:

> We held in New York Times that a public official might be allowed the civil remedy *only if* he establishes that the utterance was false. . . .
>
> *Id.* at 74, 85 S.Ct. at 215. (emphasis added)

*See also Greenbelt Corp. Publishing Assn. v. Bresler*, 398 U.S. 6, 8, 90 S.Ct. 1537, 1538, 26 L.Ed.2d 6 (1970); *Rosenblatt v. Baer*, 383 U.S. 75, 84, 86 S.Ct. 669, 675, 25 L.Ed.2d 597 (1966).

However, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975), Justice White speaking for the Court again stated that "the prevailing view is that truth is a defense." *Id.* at 489, 95 S.Ct. at 1043. Thus as to whether the communications intended to be covered by the *Times* rule, required proof of falsity as part of the plaintiff's *prima facie* case under the *New York Times* decision is at best unclear and debatable. Moreover, the subsequent restatement of the *Times* holding in the cited cases can arguably be classified as loose characterizations and thus not determinative of the question as to where the burden of proving falsity should lie. *See* Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond, 61 Va.L.Rev. 1349, 1383-84 (1975).

activities in affairs of public concern.[5] However, in *Rosenbloom, supra,* the Court was divided on whether the standard of knowing or reckless falsity applied where the alleged defamatory statements related to a private individual in a matter of public or general concern.[6]

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[5] At this stage of the development of the term a "public figure" is one who through fame, notoriety of achievements, or through voluntary participation in resolution of important public questions, seeks to influence society. *Time, Inc. v. Firestone,* 424 U.S. 448, 453, 96 S.Ct. 958, 964, 47 L.Ed.2d 154 (1976); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 337, 342, 94 S.Ct. 2997, 3005, 3008, 41 L.Ed.2d 789 (1974); *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 154, 164, 87 S.Ct. 1975, 1991, 1996, 18 L.Ed.2d 1094 (1967); *Steaks Unlimited, Inc. v. Deaner,* 623 F.2d 264, 273 (3d Cir.1980). The characteristics of this category deemed to justify the application of the actual malice standard are that the public figure invites public attention, criticism and comment and usually his access to the media to refute any defamatory publicity. *Time, Inc., supra,* 424 U.S. at 456, 96 S.Ct. at 966; *Gertz, supra,* 418 U.S. at 344, 94 S.Ct. at 3009; *Steaks Unlimited, supra* at 274.

[6] To be distinguished from those included within the "public figure" category is the involuntary public figure. This is an individual who has not attained fame or notoriety and who is thrust into an event of general public interests involuntarily. *Times, Inc. v. Firestone,* 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976). Justice Brennan in *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 91 S.Ct. 1811, 29 S.Ct. 296 (1971) argued that the "malice standard" should not focus on the nature of the individual involved but rather upon whether the event is one of general public interests. *See also Gertz, supra,* 418 U.S. at 361, 94 S.Ct. at 3017 (Brennan, J., dissenting). The *Firestone* Court specifically rejected the Brennan view stating that such an extension would unjustifiably abridge a legitimate state interest in protecting private individuals from libelous publications. *Id.,* 424 U.S. at 454, 96 S.Ct. at 965. Our decision in *Matus v. Triangle Publications, Inc.,* 445 Pa. 384, 286 A.2d 357 (1971), *cert. denied,* 408 U.S. 930, 92 S.Ct. 2494, 33 L.Ed.2d 343 (1972), which adopted the position of the *Rosenbloom* plurality, must therefore be overruled.

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Instant appellee concedes that up to this point the constitutional protection identified in *New York Times* had not been extended to the private citizen seeking redress for an alleged libel under state law. Thus the state could, without reference to the Constitution, assign the burden to prove truth upon the defendant in a private figure libel case. Brief of Appellees at 13. We agree with this concession and add, as previously noted, even if the constitutional protection had been found applicable, it was still unclear up to that point whether placing the burden of proving truth upon the defendant would have been offensive to such a Constitutional mandate. Nevertheless, appellee relies, as did Judge Sugerman, upon the Court decision in *Gertz* as the basis for the view that the First Amendment is here applicable and that placing the burden upon the defendant to prove truth runs afoul of the protection afforded free expression.

C.

In approaching the issue in *Gertz* that the Court was unable to resolve in *Rosenbloom*, they began by recognizing that the difference between the public official and public figure on the one side and the private individual on the other warranted a different approach in the two situations. The Court expressed the belief that "private individuals are not only more vulnerable to injury than public officials and public figures: they are

also more deserving of recovery."[7] *Gertz, supra,* 418 U.S. at 345, 94 S.Ct. at 3009. After acknowledging the [383] persisting antithesis that must necessarily exist between freedom of speech and press and libel actions,[8] the Court nevertheless concluded that "the states should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual."[9] Acknowledging the legitimacy of the concern of the *New York Times* Court to assure the freedoms of speech and press that "breathing space" essential to their fruitful exercise, *see NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963), the *Gertz* Court held that "the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory

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[7] The United States Supreme Court has interpreted the First Amendment as affording private individuals a greater protection from defamation than both public officials and public figures because public figures and officials enjoy a greater opportunity to reply to libelous statements and they have also purposefully assumed a position in society which invites attention and comment. By voluntarily assuming such a role in society, public figures and officials relinquish, to a degree, their right to privacy. *Gertz, supra,* 418 U.S. at 345, 94 S.Ct. at 3009.

[8] The Court noted that since libel is based upon the content of the speech, it limits the freedom of the publisher to express certain sentiments unless the publisher is willing to take the risk of the defense of a civil action in libel. *Gertz, supra* at 342, 94 S.Ct. at 3008.

[9] In this context, the Court noted that the extension of the *New York Times* test proposed by *Rosenbloom* plurality would "abridge this state interest [protecting private citizens from injury from defamatory falsehood] to a degree that we find unacceptable". *Gertz, supra* at 346, 94 S.Ct. at 3010.

falsehood injurious to the private individual" provided the state did not create a scheme that imposed liability without fault. *Gertz, supra,* 418 U.S. at 347, 94 S.Ct. at 3010.[10]

In reaching this conclusion, the *Gertz* Court stated that it believed its rule would insulate the private citizen from the stringent standard of actual malice, and yet shield the media from the rigors of strict liability.[11] The Court stated that it had chosen this approach "in recognition of the strong and legitimate state interest in compensating private individuals for injury to reputation." *Id.* at 348, 94 S.Ct. at 3011.

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[10] The *Gertz* Court characterized a rule of strict liability as one which compels a publisher or broadcaster to guarantee the accuracy of his factual assertions. *Gertz, supra* at 340, 94 S.Ct. at 3007. The Court stated that "[a]llowing the media to avoid liability *only* by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties." *Id.* (emphasis added).

[11] As a caveat to this aspect of the *Gertz* standard, the Court cautioned:

> . . . *At least this conclusion obtains where, as here, the substance of the defamatory statement "makes substantial danger to reputation apparent."* This phrase places in perspective the conclusion we announce today. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. Cf. *Time, Inc. v. Hill,* 385 US 374 [87 S.Ct. 534, 17 L.Ed.2d 456] (1967). Such a case is not now before us, and we intimate no view as to its proper resolution.
>
> *Id.* at 348, 94 S.Ct. at 3011 (emphasis added; footnote omitted).

Since, however, the defamatory character of the articles in question in this appeal was apparent, the above caveat of *Gertz* is not here applicable.

However, the Court found that this compelling state interest did not extend beyond compensation for actual injury.

> [W]e hold that the states may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.
>
> *Id.* at 349, 94 S.Ct. at 3011.

The Court was of the view that the "largely uncontrolled discretion" conferred on juries in presumed damages and the invitation in these instances to juries "to punish unpopular opinion" did offend constitutionally protected free expression. Concluding that presumed damages constituted "gratuitous awards of money damages far in excess of any actual injury," *id.* at 349, 94 S.Ct. at 3011, the Court reasoned that the state interest in these instances was insufficient to permit recovery unless, at a minimum, at least, the *New York Times* standard is met. Following the same general reasoning as employed in the case of presumed damages, the Court reached the same result for punitive damages.

## II.

### A.

[13] It is apparent from *Gertz* and the cases following it, *Herbert v. Lando, su-* [384] *pra; Time, Inc. v. Firestone, supra;* that the only restraint upon the states mandated by the First Amendment in civil actions for defamatory falsehood brought by a private figure for compensatory damages is that they may not impose

liability upon the defendant without fault. As early as 1939 this Court stated, in *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 8 A.2d 302 (1939), the liability for defamatory falsehood cannot be imposed without fault. The defendant in that case was a broadcasting company that rented its time and facilities to an advertising corporation for the transmission of a series of sponsored radio programs over one of its networks. A script for each program was prepared in advance and submitted to the broadcaster and followed exactly by the performers at rehearsals where it was approved. All participants in the program in question were employed and paid by the advertising company which had rented the time slot. When the program was over one-half completed, one of the participants interpolated an extemporaneous remark.

The trial court found that the interjected "ad lib" was "slanderous per se" and ruled that the defendant's liability was absolute though it was without any fault. In rejecting the trial court's acceptance of a theory of strict liability, Chief Justice Kephart noted:

> In Pennsylvania, the principle of liability without fault for injuries to the person has received scant consideration. The great body of our law of liability for personal injuries is that of liability through fault: liability based almost exclusively on wrongful conduct.
> *Id.* at 187, 8 A.2d at 304.

In discussing other areas where some states had imposed strict liability, reference was made to those jurisdictions that were then extending a theory of strict

liability to publishers of newspapers for defamatory publications, the Court stated:

> Considering the rule of supposedly absolute liability imposed in some jurisdictions on the publisher of a newspaper for his defamatory publications, and this is the rule here chiefly relied on, a close examination of the Pennsylvania law will show that our rule is not one of absolute liability, but rather, of a very strict standard of care to ascertain the truth of the published matter. (Citations and footnote omitted)
>
> *Id.* at 192, 8 A.2d at 307.

Thus, it would appear that long before the First Amendment considerations were raised, the common law of this jurisdiction had determined that the law of libel should require negligence or willful misconduct *See Rosenbloom v. Metromedia, Inc., supra,* 403 U.S. at 87 n. 13, 91 S.Ct. at 1841 n. 13; *Zerpol Corp. v. DMP Corp.,* 561 F.Supp. 404, 410 n. 3 (E.D.Pa.1983); *Purcell v. Westinghouse Broadcasting Co.,* 411 Pa. 167, 178-81, 191 A.2d 662, 668-69 (1963); *Williams v. Kroger Grocery & Baking Co.,* 337 Pa. 17, 19, 10 A.2d 8, 9 (1940); *Wharen v. Dershuck,* 264 Pa. 562, 566, 108 A. 18, 19-20 (1919); *Clark v. North American Co.,* 203 Pa. 346, 352, 53 A. 237, 239 (1902); *Neeb v. Hope,* 111 Pa. 145, 151-52, 2 A. 568, 570-71 (1885).[12]

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[12] Moreover, the requirement of fault has been codified in Pennsylvania law since 1901. 42 Pa.C.S. §8344 (originally enacted in Act of April 11, 1901, P.L. 74, §3, 12 P.S. §1583) provides:

> **Malice or negligence necessary to support award of damages**
>
> In all civil actions for libel, no damages shall be (illegible) the satisfaction of the jury, under the direction of the court as in other cases, that the publication has been maliciously or negligently made, but where malice or negligence appears such damages may be awarded as the jury shall deem proper.

[14] We are mindful that the former conditional privileges recognized under our law have lost their significance in the wake of *New York Times* and *Gertz*. If a private figure plaintiff is to maintain any cause of action at all, he must minimally establish the negligence on the part of the publisher. In so doing, "he has by that very action proved any possible conditional [385] privilege was abused." Restatement (Second) of Torts, Topic 3, Title A, Special Note, at 259 (1977); *see also Nevada Independent Broadcasting Corp. v. Allen*, _____ Nev. _____, 664 P.2d 337, 342-343 (1983).

**B.**

[15] The core of the reasoning of both the trial court and instant appellees is that the *Gertz* prohibition against strict liability necessarily requires that the plaintiff must have the burden of proving the falsity of the matter. This proposition does not logically flow, nor is it consistant with the concern sought to be addressed by the *Gertz* rule. The concept of fault as developed in the *Gertz* decision is not synonymous with the burden of proof of truth or falsity. The *Gertz* Court wished to avoid the possibility that a publisher may be held liable for defamation even though he took every conceivable precaution to ensure the accuracy of the offending statement prior to its dissemination. *Id.* 418 U.S. at 346, 94 S.Ct. at 3010. Under the law of this Commonwealth there is no liability for civil libel unless plaintiff can at least establish that the dissemination occurred as a result of the lack of due care. 42 Pa.C.S. §8344; *Rosenbloom, supra,* 403 U.S. at 87 n. 13, 91 S.Ct. at 1841 n. 13; *Zerpol Corp. v. DMP Corp., supra* at 410 n. 3; *Purcell v. Westinghouse Broadcasting Co., supra,* 411 Pa. at 178-81, 191 A.2d at 668-69; *Williams v. Kroger Grocery & Baking Co., supra,* 337 Pa. at 19, 10 A.2d at 9; *Wharen v. Dershuck, supra,* 264 Pa. at 566, 108 A. at 19-20; *Clark v. North American Co., supra,* 203 Pa. at 352, 53 A. at 239. A plaintiff, even though benefitting from the presumption of falsity, must nevertheless show that defendant acted maliciously or negligently. 42 Pa.C.S. §8344; *Rosenbloom, supra,* 403 U.S. at 87 n. 13. 91 S.Ct. at 1841 n. 13; *Zerpol Corp. v. DMP Corp.. supra* at 410 n. 3; *Purcell v. Westinghouse Broadcasting Co., supra,* 411 Pa. at 178-81, 191 A.2d at 668-69; *Williams v. Kroger Grocery & Baking Co., supra.* 337 Pa. at 19, 10

A.2d at 9; *Wharen v. Dershuck, supra,* 264 Pa. at 566, 108 A. at 19-20; *Clark v. North American Co., supra,* 203 Pa. at 352, 53 A. at 239. Restated, under our law the inability of the publisher to overcome the presumption of falsity of the defamatory statement will not insure recovery by the plaintiff. The recovery is dependent upon plaintiff's ability to establish malice or negligence on the part of the publisher in disseminating the defamatory falsehood.[13] *See* 42 Pa.C.S. §8343(a)(7); *Corabi, supra,* 441 Pa. at 452 n. 10, 453, 273 A.2d at 899, n. 10; *Sciandra v. Lynett,* 409 Pa. 595 at 601, 187 A.2d 586 at 589; *McAndrew v. Scranton Republican Pub. Co.,* 364 Pa. 504 at 515, 72 A.2d 780 at 785; *Montgomery v. Dennison, supra,* 363 Pa. at 262-64, 69 A.2d at 524-25.

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[13] In a rather circuitous argument, appellees contend that falsity is inextricably bound up with proof of fault. Appellees assert that to prove fault the plaintiff in fact must demonstrate the falsity of the matter. While in some instances the plaintiff may elect to establish the patent error in the material to demonstrate the lack of due care in ascertaining its truth, it does not necessarily follow that negligence of the defendant can only be shown by proving that the material is false. A plaintiff can demonstrate negligence in the manner in which the material was gathered, regardless of its truth or falsity. In such instance the presumption of falsity will prevail unless the defendant elects to establish the truth of the material and thereby insulate itself from liability. Where it is necessary to prove falsity to establish the negligence of the defendant, it is then the burden of the plaintiff to do so. This would appear to be a situation contemplated by former Chief Justice Roberts in his concurring opinion in *Moyer v. Phillips,* 462 Pa. 395, 404, 341 A.2d 441, 445 (1975) (Roberts, J., concurring joined by Nix, J.). There it is suggested that "as a practical matter, the plaintiff will find it necessary to prove the falsity of the statement in order to establish the necessary element of fault: to this extent, the defendant is relieved of the burden of proving truth as a defense." *Id.* at 407-08, 341 A.2d at 447. That proposition will not, of course, hold true in all cases. Where negligence can be established without a demonstration of the falsity of the material, there is no additional obligation upon the plaintiff to prove the falsity of the material.

[16] We are satisfied that Pennsylvania law makes a constitutionally acceptable accommodation between the freedom of ex- [386] pression required by the First Amendment and our law of civil libel for compensatory damages brought by a private individual to redress defamatory falsehood. Strict liability is a policy determination that injury flowing from a set of circumstances will be compensable regardless of the blamelessness of the conduct of the defendant. The prohibition of *Gertz* restrains a state from attempting to protect its private citizens from defamatory falsehood causing injury to reputation by allowing compensatory damages without predicating the recovery on a showing of some wrongdoing on the part of the publisher. To assess the liability solely on the basis that the published defamatory utterance was erroneous would offend the "breathing space" that free debate requires. As we understand the thrust of the *Gertz* reasoning, it would not offend the principles articulated therein to place the burden of proving truth upon a defendant as long as the recovery is dependent upon the plaintiff's ability to establish the defendant's willful or negligent conduct in publishing the defamatory matter.

Our conclusion is bolstered by the fact that the *Gertz* holding adopted the view of the dissenters in *Rosenbloom, supra,* 403 U.S. at 64, 91 S.Ct. at 1829 (Harlan, J. dissenting); *id.* at 86-87, 91 S.Ct. at 1840-1841 (Marshall, J., dissenting, joined by Stewart, J.), that the States are free to develop their own standards of liability for media defendants so long as they do not impose liability without fault. *See Gertz, supra,* 418 U.S. at 339, 347, 94 S.Ct. at 3006, 3010. In *Rosenbloom,*

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Pennsylvania libel law was under scrutiny and the dissenters were satisfied that their standard had not been violated. Although it was clear that the *Rosenbloom* Court was aware of the Pennsylvania requirement placing the burden of proving truth upon the defendant, nonetheless, neither dissenting opinion equated that allocation with strict liability. In fact, Justice Marshall plainly stated that Pennsylvania, unlike many other jurisdictions, did *not* apply a liability-without-fault standard. *Id.* 403 U.S. at 87 n. 13, 91 S.Ct. at 1841 n. 13 (Marshall, J. dissenting). Moreover, the plurality which would have required the actual malice standard at no point suggested that Pennsylvania law attempted to impose liability without fault.

What the appellee is in essence arguing is that, even though the media publishes or reports maliciously or negligently a defamatory statement injurious to the reputation of a private citizen, it should be insulated from liability unless the plaintiff can affirmatively demonstrate the falsity of the statement. We find nothing in the Supreme Court decisions that would suggest such a result. The "breathing space" requirement of the First Amendment has not been extended, nor do we believe it can be reasonably extended, to condone or to encourage irresponsible conduct by the media in its exercise of informing the public of newsworthy events. Nor can we conceive of a legitimate constitutionally protected interest in condoning the media's malicious or negligent discharge of this responsibility. Free debate will not be encouraged by allowing it to become the forum for malicious or negligent abuse of the reputation of those involved in the

controversy. The right to criticize must carry some degree of responsibility, particularly where it may jeopardize the reputation of a private citizen.

We note further that a media defendant in a civil libel action is given even greater protection under our statutory law. In addition to the privilege to communicate matters of public interest and concern without fear of liability for erroneous information disseminated without negligence or malice, a newspaper publisher is privileged to withhold the identity of sources of information. The Pennsylvania Shield Law, 42 Pa.C.S. §5942(a), provides that:

> (a) General rule.—*No person* engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or pub- [387] lishing news, *shall be required to disclose the source* of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

This statute has been interpreted broadly. *See, e.g., Lal v. CBS, Inc.*, 726 F.2d 97, 100 (3d Cir.1984); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 278 (3d Cir.1980); *In Re Taylor*, 412 Pa. 32, 40, 193 A.2d 181, 185 (1963). There, sources are excludable whether or not they contain the identity of sources actually used by the newspaper since the identity of all persons named or implicated in these sources is also included within the

protection of the "shield law" *Lal v. CBS, Inc., supra* at 100; *Steaks v. Deaner supra* at 278; *In Re Taylor, supra,* 412 Pa. at 40, 193 A.2d at 185.[14]

As a consequence of this greater protection to the media defendant provided by the "shield law", the plaintiff in a civil libel action is restricted in his ability to prove the falsity of the defamatory statement. He is denied access to the sources of information on which the statement is based. The defendant, who does possess that information is therefore in a better position to prove the truth of the defamatory statement. Thus this additional protection to a media defendant and the resulting impediment imposed upon the plaintiff in seeking to establish the falsity of the statements provides a further justification for maintaining our current practice of requiring the defendant to prove truth in defense of such a suit.

C.

[17] For the foregoing reasons we hold that in a libel suit brought by a private individual for compensatory damages resulting from the defamatory material, the presumption of falsity remains and the defendant has the option of proving truth as an absolute defense to the action. The trial court's instruction to the contrary was error and the resulting verdict cannot be allowed to stand. Since the verdict was a general one we are unable to ascertain whether the jury found for the defendants because of its conclusion that the plaintiff had failed to

[14] It must be noted that the shield law is designed to protect the confidentiality of the source; it was never intended to be interpreted as insulating the publisher from its negligence or actual malice.

establish the falsity of the defamatory statements or whether the verdict reflects a finding that defendant was not negligent in publishing the material. The latter reason, of course, would have been a proper basis for the verdict, but the former reason is not in accordance with our law. Accordingly, the judgment of the trial court is reversed and a new trial is awarded as to the claim for compensatory damages.

## III.

Since we are remanding the cause for a new trial on compensatory damages, it is also necessary to review appellant's assertion that the trial court erred in withdrawing from the jury's consideration the punitive damage issue. The trial court ruled that the appellant had presented insufficient evidence of the reporter's "actual malice" at trial so as to raise a triable issue of fact. We agree.

We should note that the *Gertz* decision has raised considerable controversy concerning whether it foreshadows the total abolition of punitive damage awards in defamation cases.[15] In holding unconstitutional

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[15] Some commentators believe that *Gertz* indicates the United States Supreme Court will ultimately abolish punitve damage in defamation cases. *See, e.g.,* Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 Tex.L.Rev. 199, 215 (1976); Comment, 28 Vand.L.Rev. 887, 897 (1975).

Other commentators have concluded that *Gertz* did not in itself abolish punitive damages but merely limited their availability. *See, e.g.,* Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 Rut.-Cam.L.J. 471, 507 (1975); Comment, 6 Loyola University Law J. 256, 267 (1975).

the awarding of presumed or punitive [388] damages where defamatory publications are negligently published, the *Gertz* Court reasoned that the potential for large jury verdicts, completely unrelated to the actual injury suffered by the victim, might have a chilling effect or act as a prior restraint of free expression. *Gertz, supra,* 418 U.S. at 350-51, 94 S.Ct. at 3012-13. Further, the Court surmised that the doctrine of presumed damages and the unabridged discretion conferred upon juries to award punitive damages, bearing no relationship to the injury suffered, invites juries to punish the expression of unpopular opinion rather than effectuate any legitimate social goal. *Id.* at 351-51, 94 S.Ct. at 3012-13. Nonetheless, a number of courts have considered whether *Gertz* presaged the abolition of punitive damages and have concluded that it did not.[16] We are satisfied that under the present law as articulated by the United States Supreme Court there has not been a sufficiently definitive directive to cause us to abandon the long standing practice in this jurisdiction of allowing punitive damages in the appropriate case.

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[16] *Hunt v. Liberty Lobby,* 720 F.2d 631 (11th Cir.1983); *Maheu v. Hughes Tool Co.,* 569 F.2d 459 (9th Cir.1977); *Buckley v. Littell,* 539 F.2d 882 (2d Cir.1976); *Appleyard v. Transamerican Press, Inc.,* 539 F.2d 1026 (4th Cir.1976), *Carson v. Allied News Co.,* 529 F.2d 206 (7th Cir.1976), *Davis v. Schuchat,* 510 F.2d 731 (D.C.Cir., 1975); *Selby v. Savard,* 134 Ariz. 222, 655 P.2d 342 (1982); *Roemer v. Retail Credit Co.,* 44 Cal. App.3d 926, 932, 119 Cal.Rptr. 82, 85 (1975); *Fopay v. Noveroske,* 31 Ill.App.3d 182, 198, 334 N.E.2d 79, 92 (1975); *Embrey v. Holly,* 293 Md. 128, 442 A.2d 966 (1982); *Newspaper Publishing Corp. v. Burke,* 216 Va. 800, 224 S.E.2d 132, 136 (1976); *Calero v. Del Chemical Corp.,* 68 Wis.2d 487, 228 N.W.2d 737, 747 (1975).

[18, 19] The *Gertz* decision did make it clear that the negligent standard of fault would not be a sufficient basis for the allowance of punitive damages. To justify punitive damages, the plaintiff is called upon to satisfy the "actual malice" test. *Gertz v. Robert Welch, Inc., supra* at 350, 94 S.Ct. at 3012; *Levine v. CMP Publications, Inc.*, 738 F.2d 660, 674 (5th Cir.1984); *Braun v. Flynt*, 726 F.2d 245, 256 (5th Cir.), *cert. denied*, _____ U.S. _____, 105 S.Ct. 252, 83 L.Ed.2d 189 (1984); *Hunt v. Liberty Lobby*, 720 F.2d 631, 650 (11th Cir.1983); *Golden Bear Distributing Systems of Texas, Inc.*, 708 F.2d 944, 947 (5th Cir.1983); *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 479 (9th Cir.1977); *Appleyard v. Transamerican Press, Inc.*, 359 F.2d 1026, 1030 (4th Cir.1976), *cert. denied*, 429 U.S. 1041, 97 S.Ct. 740, 50 L.Ed.2d 753 (1977); *Buckley v. Littell*, 539 F.2d 882, 897 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062, 97 S.Ct. 785, 50 L.Ed.2d 777 (1977); *Carson v. Allied News Co.*, 529 F.2d 206, 214 (7th Cir. 1976); *Davis v. Schuchat*, 166 U.S.App. D.C. 351, 357, 510 F.2d 731, 737 (1975). We therefore turn to the question as to whether, upon this record, the trial court was correct in concluding that the evidence was insufficient to establish "actual malice". After a thorough review of the record, we are satisfied that the trial court's decision in this regard was correct.

[20-22] In assessing the propriety of the trial court's withdrawal of the issue from the jury, we are mindful that such a ruling should be entered only in a clear case. *Heffernan v. Rosser*, 419 Pa. 550, 215 A.2d 655 (1966); *Howard Express Co. v. Wile*, 64 Pa. 210 (1870). The publisher's hatred, spite, hostility or deliberate intention

to harm the plaintiff is not sufficiently probative of his knowledge of falsity or awareness of probable falsity so as to allow its admissibility where "actual malice" is at issue, but once established, the elements heretofore enumerated would be admissible. *Cf. Greenbelt Coop. Publishing Ass'n. v. Bressler, supra,* 398 U.S. at 10-11, 90 S.Ct. at 1539-1540. As has been suggested, such testimony would invite a jury to improperly find a defendant liable where he acted with a guilty heart rather than a guilty mind. Also, it is axiomatic that a publisher's failure to investigate in itself is insufficient to establish "actual malice", *St. Amant v. Thompson, supra,* 390 U.S. at 732-33, 88 S.Ct. at 1326-27; *New York Times Co. v. Sullivan, supra,* 376 U.S. at 287-88, 84 S.Ct. at 729-30; *Hunt v. Liberty Lobby, supra* at 643; [389] *Brewer v. Memphis Publishing Co., Inc.,* 626 F.2d 1238, 1258 n. 26 (5th Cir., 1980); *New York Times v. Conner,* 365 F.2d 567, 577 (5th Cir.1966). So too, errors of judgment or interpretation as opposed to errors of historical fact have been held to be insufficient to create a jury issue of "actual malice". *Time v. Pape,* 401 U.S. 279, 290, 91 S.Ct. 633, 639, 28 L.Ed.2d 45 (1971).

[23, 24] "Actual malice" can be established either by proving the publication was made with the knowledge of the falsity of its content or with reckless disregard of whether it was false or not. *Rosenblatt v. Baer,* 383 U.S. 75, 84, 86 S.Ct. 669, 675, 15 L.Ed.2d 597 (1966); *New York Times Co. v. Sullivan, supra.* When the first alternative is relied upon, the plaintiff must show not only the falsity of the statement but, in addition, it is the plaintiff's responsibility to establish the defendant's knowledge of that falsity at the time of publication.

[25] In this context it must be noted that the presumption of falsity available to the plaintiff where the negligent standard is applicable is of no assistance in meeting the burden of proving "actual malice" under this theory. The Supreme Court has made it clear that a presumption may not be used to satisfy the fault element of the cause of action. It is also to be noted that under our traditional law such an approach would not be allowed. We have long recognized the evidentiary principle that a presumption may not be built upon a presumption. *Collins v. Hand,* 431 Pa. 378, 246 A.2d 398 (1968); *Auerbach v. Philadelphia Transportation Co.,* 421 Pa. 594, 221 A.2d 163 (1966); *Neely v. The Provident Life and Accident Insurance Co.,* 322 Pa. 417, 185 A. 784 (1936); *Philadelphia City Passenger Railway Co. v. Henrice,* 92 Pa. 431 (1880); *Douglas v. Mitchell's Executor,* 35 Pa. 440 (1860). In this instance it would require presuming not only that the content was false, but also that the defendant at the time of publication knew of that falsity. This is the clearest type of double presumption that we have rejected. *Cf. Collins v. Hand, supra; Auerbach v. Philadelphia Transportation Co., supra.*

In the instant matter there was no basis for the jury to have concluded that the publication was made with the knowledge of the falsity of its content. While the plaintiff attempted to show that the dissemination was made with reckless disregard of the truth of its content, it is equally apparent that a jury issue was not created under the clear and convincing test required for such an award of damages. *Bose Corp. v. Consumers Union of U.S., Inc., supra,* _____ U.S. at _____ n. 30, 104 S.Ct. at

1965 n. 30, 85 L.Ed.2d at 526 n. 30; *Gertz v. Robert Welch, Inc., supra,* 418 U.S. at 342, 94 S.Ct. at 3008; *St. Amant v. Thompson, supra,* 390 U.S. at 731, 88 S.Ct. at 1325; *Garrison v. Louisiana, supra,* 379 U.S. at 74, 85 S.Ct. at 215; *New York Times v. Sullivan, supra,* 376 U.S. at 280, 84 S.Ct. at 726; *Levine v. CMP Publications, Inc., supra* at 674; *Gertz v. Robert Welch, Inc.,* 680 F.2d 527, 538 (7th Cir. 1982), *cert. denied,* 459 U.S. 1226, 103 S.Ct. 1233, 75 L.Ed.2d 467 (1983); W. Prosser, *Torts* 771-772, 821 (4th ed. 1971). Thus the trial court properly withdrew that question from the jury's consideration. *Heffernan v. Rosser,* 419 Pa. 550, 215 A.2d 655 (1966); *Thomas v. Tomay,* 413 Pa. 270, 196 A.2d 740 (1964); *Greet v. Arned Corp.,* 412 Pa. 292, 194 A.2d 343 (1963); *Luterman v. Philadelphia,* 396 Pa. 301, 152 A.2d 464 (1959); *Miller v. Montgomery,* 397 Pa. 94, 152 A.2d 757 (1959); *Hepler v. Hammond,* 363 Pa. 355, 69 A.2d 95 (1949).

## IV.

Accordingly, the order of the trial court is reversed and a new trial is awarded. The new trial will be confined to a determination of defendant's liability and the assessment of compensatory damages if the liability issue is decided in favor of the plaintiff.

LARSEN and McDERMOTT, JJ., did not participate in the consideration and decision of this case.

## APPENDIX M

### Excerpts of John N. Bradley Deposition

[3] *PROCEEDINGS*

Whereupon,

JOHN N. BRADLEY

was called as a witness and, after being first duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR THE PLAINTIFF

By Mr. Reihart:

Q. Would you state your name and address, please? A. John N. Bradley.

I reside at Route 1, Box 94, St. Michaels, Maryland, 21663.

Q. Mr. Bradley, have you attended college? A. Yes, I have.

Q. Which college was that? A. Wayne University.

Q. Did you graduate? A. Yes, I did.

Q. When? A. In 1941.

Q. Did you receive a degree? A. I received a degree of Bachelor of Science in mechanical engineering.

[4] Q. And following graduation, did you obtain employment? A. Yes. As a matter of fact, I was employed during the last year of my work at the University by the United States Rubber Company. I continued working for them after I graduated.

Q. What does the United States Rubber Company manufacture? A. The part I was concerned with was tires.

*Appendix M—Excerpts of John N. Bradley Deposition.*

Q. Did you have a title when you joined the company? A. When I joined the company, I was working in the mill room as a quality control man testing rubber, because I did not have a degree at that time. After I graduated I went to work upstairs in the tire construction development department as a project engineer and from there I progressed gradually and I got to be a group leader, got to be manager, head of the department.

We were concerned there with the development of tire construction, the way they build the tires, put them together, and also, of course, concerned with how they performed in service.

Q. What were the nature of your duties there with the company? A. When I first started there, of course, as a project engineer I had to follow the construction of development tires, design tires to do particular services, actually supervise the [5] building of the development tires, observe the failed tires that came back from the field, find out what happened to them, make corrections.

And as I gradually got to be the manager of the department, I had to oversee these functions.

Q. How long did you work for the United States Rubber Company? A. Eighteen years.

Q. And when did you leave them? A. That was in 1956.

Q. By whom were you next employed? A. By the Budd Company.

Q. What was your title with the Budd Company? A. I started with the Budd Company as assistant executive engineer.

*Appendix M—Excerpts of John N. Bradley Deposition.*

Q. What were the nature of your duties? A. I had a group of project engineers whose duty was basically to develop new wheel products for the Budd Company for their customers, to follow the current products through production, follow them through the field to make sure they performed correctly, run tests on the current products, and make sure that the products we were making were satisfactory, and that [6] the new products would be meeting the needs of the customers.

Q. I take it the Budd Company then is a manufacturer of rims? A. Rims and discs and wheels.

Q. What kind of rims were they manufacturing while you were employed by them? A. At the time I was employed by them,—they purchased a lot of their rims at that time. They made their own passenger car rims and they were making one-piece tubeless rims, all the multi-piece rims that they made wheels out of they were purchasing from either Firestone or Goodyear.

Q. What professional organizations do you belong to or during your professional career did you belong to? A. I belong to the Society of Automotive Engineers, and to the Ordinance Association, and I belong to the Detroit Engineering Society.

Q. Did you hold any offices with these organizations? A. I also belong to the Tire and Rim Association. At the Tire and Rim Association—I belonged to the Tire and Rim Association when I was a member of the United States Rubber Organization. I got to be vice president of that organization while I was with the tire company.

[7] When I went over to the wheel company, the Budd Company, I developed to the point where I got to be president of the organization.

*Appendix M—Excerpts of John N. Bradley Deposition.*

Q. Have you served on any international committees that deal with rims or tires? A. Yes. The Society of Automotive Engineers had a committee, an International Standardizing Committee. I was chairman of that committee.

Q. What was done by you as chairman? A. Well, as chairman, we were one of the first people who actually developed international standards on wheels. We actually developed standards on the testing of wheels, both truck wheels and passenger car wheels.

Q. For whom? A. For the world.

Q. Did you hold periodic meetings as chairman? A. Yes. We had a meeting once a year and it was either held in Europe or in this country.

Q. Who would attend those meetings? A. Engineering representatives from all the countries, Italy, France, Germany, United States, of course, always.

Q. And as a result of your service on that committee and [8] with the others that served on there, were there any international standardization of wheels and tires that occurred? A. The standards that finally developed were on the testing and evaluation of the wheels.

Q. Have you written or published any articles? A. Yes. I have published four articles for the Society of Automotive Engineers.

Q. Were those what you would call technical articles that dealt with rims or wheels? A. Yes, they were.

Q. Were they translated into other languages? A. Yes.

Q. Do you hold any patents concerning wheels? A. Yes. I have seven patents.

Q. Are you presently employed by the Budd Company? A. No.

*Appendix M—Excerpts of John N. Bradley Deposition.*

Q. By whom are you employed? A. I am retired.

Q. From what company did you retire? A. From the Budd Company.

Q. When was that? A. That was in—April 1, 1977.

[9] Q. Have you acted as an expert witness in lawsuits? Has your testimony been received as an expert in any lawsuits throughout the country? A. Yes, it has.

Q. Have you testified—has your testimony included an opinion concerning multi-piece rims? A. Yes.

Q. Concerning their safety? A. Yes, indeed.

Q. And their viability as a safe product? A. Yes.

Q. What courts have you testified in? A. I have testified in federal courts, state courts, in various parts of the country.

Q. What states have you testified in? A. Well, I have testified—this is a little difficult because there have been several, but I have been in Wyoming, Texas, California, Michigan, Ohio, and there are several others, but—this is not something I keep track of.

Q. In those various jurisdictions you have been accepted as an expert on multi-piece wheels and single-piece wheels? A. Yes.

[10] Q. In early 1981, were you contacted by someone from the CBS New staff? A. Yes, I was.

Q. About when did that occur? A. Well, the date escapes me. I think it was early 1981.

Q. What happened? A. What happened is I got a call from a gentleman who said his name was Allan Maraynes and he said that he was with CBS 60 Minutes, he was a producer of CBS 60 Minutes and he understood I used to be in the wheel business and that they were investigating a class action suit in Kansas City and that they did not know anything about wheels but they knew

that I did and they would like to have me come down and explain to them the difference between the various kinds of truck wheels.

I said, "Well, gee, that is fine. I can do that. Where did you get my name?"

He said, "Gosh, I am not real sure. I think our researcher got it from one of the safety papers."

Well, the next night Mike Wallace called me and he said, "Mr. Bradley, we have got you set up in a little suite in the Waldorf. Why don't you come down, bring your wife and have a nice little vacation and we will talk about truck wheels."

[11] I said, "Okay."

I said, "Where did you get my name?"

He said, "Gosh, I really don't know for sure. Our researcher got it and I am not sure but I think she found it in one of the safety papers."

So about 10 days or two weeks later my wife and I went to New York. We went to the Studio and met with Mike Wallace. He introduced me to the researcher.

I said to her, "Where did you get my name?"

She said, "Oh, I am not real sure. I think it was one of the highway safety papers."

In the meantime I said to Mike Wallace, I said, "So long as we are going to talk about truck wheels, why don't you give me a blackboard and a piece of chalk and I will draw a diagram and explain the difference between the various kinds of wheels."

Q. Before you got to that point, were you invited to come to New York at your expense or at CBS's expense?
A. They were going to pay my expenses.

Q. When you discussed this with Mike Wallace, did he tell you any particular hotel you were going to stay

in? A. He told me he was setting me up at the Waldorf Astoria. [12] He made the arrangements for my hotel room.

Q. Would you explain to the jury what kind of accommodations were made for you? A, This was a very plush room. It was a suite, really. The room cost three—either $324 or $240 a day. It was quite impressive. It had a fireplace in the living room, separate, big bathroom with—nice, very, very pleasant.

Q. What about your transportation, who agreed to pay for that? A. They were going to pay for my transportation.

Q. And Mike Wallace told you CBS would pay for that? A. Yes.

Q. What about your meals? A. All my expenses were to be paid.

Q. In fact, were they paid by CBS? A. Yes, they were.

Q. You went to their studio in New york and I think you indicated that Mike Wallace was talking to you? A. Yes, that's right.

Q. What happened? A. Well, you mean before the interview?

Q. Yes. [13] A. After my discussion with he and his researcher, who did not know me, they took me into the studio and sat me down on a sofa—

Q. Did you get the blackboard you asked for? A. No. That never showed up.

They took me into this studio, sat me down on a sofa with Mike Wallace facing me in an easy-chair, pinned on a microphone on my lapel, adjusted the cameras and there were at least two cameras, turned on the lights, and the cameras were rolling, and Mike Wallace reached

under his chair, pulled out a stack of papers about a foot high, took off the top one and said, "Mr. Bradley, do you remember writing this letter in 1969?"

I realized right then that they were not looking for my expertise on wheels but they wanted to question me about my part in the wheel industry.

Q. And what was your response to that first question? A. I said, "Of course, I do." I read the letter and I remembered it, it was one of the highlights of my life. I remembered that letter very well.

Q. Did you thoroughly explain how the letter came to be written? A. Yes, I did.

[14] Q. Then what happened? A. They then went on taping me and continuously—they ran out of tape twice. They had to stop the cameras and go get more film. They taped me for a solid hour and a half.

Q. I see.

Prior to that interview, had you reviewed the Phase 3 Report prepared by Failure Analysis Associates? A. Yes, I had.

And do you consider that report a credible and authoritative report?

Mr. Williams: I object.

It is irrelevant.

The Witness: I certainly do.

By Mr. Reihart:

Q. Did Mike Wallace ask you any questions about the Phase 3 Report? A. No, he did not.

Q. Did you have any discussions with him about Dr. Roger McCarthy? A. No.

Q. Your interview took how long? A. It took an hour and a half.

[15] Q. Was it a recorded interview? A. It was recorded, yes. They had to go out and get more film. They kept running out of film.

Q. You were sitting in a chair.

Were lights on you? A. I was sitting on a sofa. Mike Wallace was sitting in a chair and lights were upon me, yes.

Q. During the interview, did you discuss the safety of multi-piece rims with Mike Wallace? A. At some length.

Q. What did you tell him? A. I told Mike Wallace—first of all, I said that wheels, both multi-piece and single-piece wheels were very safe. All the wheels that we made were a very safe product. That on a truck, the safest item on the truck were the truck wheels, that there were fewer fatalities from truck wheels, than there were from defective parking lights.

Q. The cameras were rolling while you said these things to him? A. Yes.

Q. Did you discuss the RH5-degree rim with him? A. I did.

[16] Q. What did you tell him about it? A. I told him that I kept records of all the wheel products we made and all the warranty claims that were made, every one of these claims came into my office and was recorded by one of my people and I had card files on every product we made.

I said that the RH5-degree rim was the safest product we had ever made.

Q. Did you talk to Mike Wallace about Paul Hykes? A. Yes, I did.

Q. Do you remember what the conversation was? A. Well, the very first letter that Mike Wallace showed me was the letter that I had written in response to Paul

Hykes' letter. So we went on to some extent talking about Paul Hykes and I told him that Paul Hykes had never mentioned that he did not like the RH5-degree rim as long as he worked at the Budd Company, and I would know because I was his immediate assistant.

We had conversation about safety and truck wheels and this sort of thing, this is part of our life, what our product was. Never mentioned that he did not think that the RH5-degree rim was a safe product.

Q. Did he present to you, this is Mike Wallace, a letter [17] written in 1969 by Paul Hykes? A. Yes, he did.

Q. And was that in conjunction with a memo that he had shown you? A. Yes.

Q. When you wrote the memo, that was in response to the letter? A. Yes, it was.

Q. During the interview, did you say you were pressured to take out any material during a slide presentation to the Department of Transportation in 1970? A. No. I made quite a point that I was not pressured, that I had shown this presentation to many people, and I was looking for advice as to how to best present this presentation to the government and to present the case for our products.

Q. Did anybody change your recommendation that you had originally formed in putting together this presentation? A. No.

Q. Did your presentation recommend that single-piece rims were safer or better at tire retention? A. Not at all. They are not, as a matter of fact.

Q. Now, we talked about the memo that you had written and [18] also Paul Hykes' letter.

Were either one of these items given to you to examine before the cameras started rolling and you were asked

questions? A. No. As I said, I was completely surprised when he asked me this question because he told me that he did not even know who I was. His researcher found me in one of the safety papers.

Q. In 1969 when Paul Hykes wrote the letter that Mike Wallace showed to you, was he an employee of the Budd Company? A. No. He had left the Budd Company about three years before that.

Q. And did you tell Mike Wallace then in the interview that during the time that Paul Hykes worked with you he had never expressed any opinion that the RH5 degree rim was not safe? A. Yes, I did.

Q. Now, did you discuss—did Mr. Hykes have authority to recall or withdraw the RH5-degree rim that Budd had sold? A. Mr. Hykes was the chief engineer of the Budd Company and it was his duty and responsibility to insure the safety of all the products that he made. He had complete responsibility [19] for withdrawing that rim. If he had said, "I do not want to make this rim because it is unsafe.", the Budd Company would never have made another wheel.

As a matter of fact, I told Mike Wallace that if I had said this the Budd Company would never have made another one of those products.

Q. You told these things to Mike Wallace during the interview? A. Yes, I did.

Q. Did you discuss with Mike Wallace certain proceedings that had occurred out in the State of Utah where they were considering some kind of safety standards or to follow with references to the multi-piece rims? A. Yes. This was on the RH5-degree rim, the State of Utah.

Q. You discussed that with Mr. Wallace? A. Yes.

*Appendix M—Excerpts of John N. Bradley Deposition.*

Q. Now, Mr. Bradley, did you see the program "Killer Wheels" that was broadcast as part of the 60 Minutes program on March 8, 1981? A. Yes, I did.

Q. How did you learn of the program? [20] A. One of the secretaries from CBS called me two or three days before the program and told me it would be on that coming Sunday, also advised me to look in the upcoming Wall Street Journal, that there would be an article in the Journal on this program.

Q. Someone at CBS called you? A. Yes.

Q. Do you remember who it was? A. No. It was one of the girls and she—if she identified herself I don't remember but I don't think she did.

Q. After you watched this show, what was your reaction? A. I was shocked.

Q. Why? A. Well, when I left the program I thought I had done a fairly good job, I presented our case, and explained about multi-piece rims. When the program came on, it did not come off that way at all. It appeared as though I hadn't done a good job. It did not look like what I had told Mike Wallace.

They edited so much and changed so much it wasn't the same program.

Q. Recently, on October 28, 1982, I asked some questions of Mike Wallace and I have before me one of those questions on [21] page 47, line 6.

My question was, of Mike Wallace, "Do the questions and answers of Jack Bradley that were included in the program reflect fairly, honestly and without distortion what was said during the taping?"

The answer was, "Indeed they do."

Do you agree with that? A. I do not.

Q. Now, have you written to CBS to obtain a full and complete copy of your interview? A. Yes.

*Appendix M—Excerpts of John N. Bradley Deposition.*

Mr. Williams: I object to this.
Irrelevant.

By Mr. Reihart:

Q. With what result? A. I wrote to them twice. The first time they responded with giving me the transcript of the program as it was actually shown. I asked for the full program of an hour and a half. I wrote back and said that wasn't what I wanted, what I wanted was the full taping of the full hour and a half and they did not respond to that letter at all.

Q. I would like to to go a copy of the transcript—I [22] am not familiar with what our Exhibit is now.

Mr. Thomas: The one I have here is not numbered.

Mr. Williams: I will tell you in a minute.

Plaintiff's Exhibit 4.

Mr. Reihart: This will be 4?

Mr. Williams: No. You already have marked the transcript as Plaintiff's Exhibit 4 in connection with an earlier deposition.

Mr. Reihart: All right.

By Mr. Reihart:

Q. Mr. Bradley, I hand you what has been previously marked Plaintiff's Exhibit 4 for identification.

And I will ask you if you can recognize what that is. A. Yes. I recognize this.

Q. What is it? A. It is a transcript of the program as it was presented on CBS on "Killer Wheels."

Q. On March 8, 1981 and September 6, 1981? A. Yes.

Q. Would you turn to page 5, please?

Now Mike Wallace, I am reading from the top of the page, the first quote attributed to Mike Wallace, "Mr. Bradley, are [23] multi-piece rims dangerous?"

Then they have written, "JACK BRADLEY: Not—absolutely not.

"WALLACE' Not dangerous?

"BRADLEY: They are not dangerous."

In the interview that you had with Mr. Wallace, was this the first question put to you in the interview? A. No. As I stated before, the first question he had was, "Mr. Bradley, do you remember writing this letter back in 1969?"

Q. Is that answer also there, "Not—absolutely not.", the answer you gave to the question, "Are multi-piece rims dangerous?" A. It doesn't sound like it. I don't believe I would have said "not", I would have said, "No, absolutely not."

Q. Next, Mike Wallace says that, "the Budd people", go down a little bit further in the page, and it says, "So, the Budd people were, by and large, pretty satisfied", do you have that? A. No.

Q. It is down—it would be in the middle of the page—"So, the Budd people were, by and large, pretty satisfied that the multi-piece rim, particularly the RH5, was a safe product?"

[24] Then, "BRADLEY: Yes.

Wallace then says, "I then read Bradley a letter from Budd's former chief engineer, a man named Paul Hykes, who wrote about the RH5 after he had left the Budd Company.

"He says in the letter: 'It is more subject to dangerous wear than any other designs. The only time that this dangerous wear can be detected is when the rim is dismantled.' He says: 'The RH5 can be put together improperly and subsequently blown apart when new. From the foregoing, you can readily understand why I

ask the question, "Why has this rim not been removed from the market?" ' Now this was your boss back in 1969, Paul Hykes, chief engineer of the Budd Company, suggesting the rim should be taken off the market."

Then the transcript quotes you as saying: "Then as—as close as I was to Paul, I never realized that he had these feelings about the RH5-degree rim.

"WALLACE: You did not know that he and others had those feelings about the RH5 rim?

"BRADLEY: I haven't—I've—I—I—I—I knew—I—I'm—I swear that I did not know while Paul was at the Budd Company that he objected to the RH5-degree rim.

"WALLACE: But if Bradley didn't know about Hykes' [25] feelings while the former chief engineer was with the company, nonetheless Bradley did consider the effects of such criticism. I read back to him a memo he himself had written about the Hykes letter."

This is Wallace reading: "I'm certain we will be asked in the near future to comment on Mr. Hykes' letter. Any publicity along this line could be very detrimental to the Budd image, particularly with the interest that the Department of Transportation has on safety at this time."

Then they quote you. "BRADLEY: What—what did I say? I said I didn't want a lot of publicity. Naturally. Who would?"

Now, is this the order of the questions and answers that you gave at the time of the interview? A. No. This is completely out of order. I was taped for an hour and a half and this came out to be about 10 or 15 minutes and the questions were changed around, edited, completely different program.

Q. Are your full answers given in this transcript that we have read? A. No. He edited out most of my explanations.

Q. The Hykes letter was written three years after he had left the Budd Company? [26] A. Yes, it was.

Q. And the memo was written in response by you to that letter after Hykes had left the Budd Company, is that right? A. That's correct.

Q. And did you publish this memorandum to the public or was this an internal— A. This was an internal letter.

Q. Was it written to the general public— A. Are you talking about Mr. Hykes' letter now?

Q. No, your letter, your memo. A. My letter was written to my immediate supervisors, people in the company who would be interested.

Q. Why did you write the letter? A. Just like I said, it looked to me like we were getting some adverse criticism that wasn't warranted and we certainly did not want this kind of criticism. When you are criticized whether it is justified or not, people believe it is true.

Q. Was your explanation of this memo given to Mike Wallace? A. Yes.

Q. Along next in the transcript is this statement by Mike Wallace, I am on page 6.

[27] "WALLACE: Bradley still insisted the multi-piece rim was no more hazardous than the single-piece rim. But we had learned of an industry memorandum that said Bradley might have been pressured into changing his presentation at Department of Transportation hearings back in 1970, a presentation that would have shown that some multi-piece rims could not pass certain safety tests and that the industry might be better off moving to the single-piece rim."

Now, first, were you pressured to change your presentation at the Department of Transportation in 1970? A. No.

Q. Did you tell that to Mike Wallace? A. Yes, I did.

Q. Did your presentation have anything to do with the unsafeness of multi-piece rims? A. No. No. Actually my presentation, first of all, it showed that with the current wheels, that there is no way that you could keep tires on rims on a run flat test. I was trying to promote a new rim of my own which happened to be a tubeless rim but it was also a multi-piece tubeless rim that I thought could answer all these questions, and that is what my presentation was really for.

[28] Q. That wasn't changed in any way by the conversation you had with someone from the Ford Motor Company? A. No. I did take out two slides. Those two slides did not change the concept of the presentation.

Q. Did you explain to Mike Wallace why the slides were taken out? A. Yes.

Q. What did you tell him? A. I told him that I had been showing this program to many people and I was looking for constructive criticism. These two slides were taken out because the Ford people who looked at it said they thought it was an unfair presentation of what really was happening to truck wheels on a run flat condition, and they were right.

Q. What do you mean by that? What did the slides show? A. The slides showed that the side ring under run flat condition, when there is no air in the tires, running flat down the road, that the side rings would come off. This does happen but it is such a rare occurrence, as a matter of fact, I never knew of a single

case happening to a Budd product, but I showed this as one of the important features of my program. It wasn't really true.

[29] Q. You explained this in depth to Mike Wallace? A. Yes.

Q. This is while the cameras were going? A. Yes.

Q. Let's turn to the transcript. We are on page 6. It starts a third of the way down the page where it says, "(Bradley laughs softly)" and Mike Wallace: "You smile, but isn't it a fact that what you were going to say at those Department of Transportation hearings was that multi-piece rims would not pass the sudden-deflation test at 60 miles per hour and that the industry should go to the single-piece rim?

"BRADLEY: Yes, I had planned that.

"WALLACE: Why?

"BRADLEY: I—I—I—I said that I—I had—I showed my presentation to one of our very good customers, and—"

Wallace said, "Who?

"BRADLEY: (Laughs) It was the Ford Motor Company.

"WALLACE: Yes?

"BRADLEY: And they suggested that I—that—and they only suggested, they didn't tell me, they just suggested if I took out two of the slides, my presentation would not be basically changed and it would make it—it wouldn't—it [30] would be quite as damaging to the—to the industry. Not—not because the single-piece is basically safer than the multi-piece.

"WALLACE: Then why?

"BRADLEY: Because we—it was one way of—of taking some of the pressure of off us from—from—from the government. And—and from our standpoint—

*Appendix M—Excerpts of John N. Bradley Deposition.*

"WALLACE: What kind of pressure? Why was the—

"BRADLEY: All—all of the things you're saying there.

"WALLACE: That the RH5 or the multi-piece was less safe than the single-piece?

"BRADLEY: That is what they were saying."

Now, does this part of the program that I just read reflect what was actually said by you? A. No. He has taken so much out of context and changed it around it doesn't follow at all.

It is hard for me to say what this does represent because it has been so edited.

Q. Go back up to the top third of the page.

The purpose of the hearings in 1970, did they have anything to do with the safety of single-piece rims? A. No.

Q. Then the last statement here that indicates Wallace [31] saying that the RH5—the hearings had nothing to do with the safety of multi-piece rims, is that correct? A. That's correct.

Q. Back up to the top of the transcript on page 7, where Wallace says, "That the RH5 or the multi-piece was less safe than the single-piece?"

And then they quote you as saying, "That is what they were saying."

That was not even part of the hearings in 1970? A. That's right. That had nothing to do with the hearings in 1970.

Q. Let's go to one other part of the transcript, page 7, at the bottom, approximately the bottom quarter.

Mike Wallace says, "Do you think it would be a good idea now to recall, for instance, the RH5's that are still on the road?

"BRADLEY: I—I see—I really don't see any—any point in recalling those versus any other, like—as I pointed out before. They were the safest part we ever made, on—on a statistical basis.

"WALLACE: And the accidents that have happened, you simply have to buy as part of the—part of the bargain, in a— [32] in a sense?

"BRADLEY: This is the way life is."

Now, is that an accurate representation of what you said during the interview? A. No. No. The very last thing Mike Wallace said to me is, "Mr. Bradley, aren't you concerned that your company and other companies like yours are going to lose millions of dollars in lawsuits because of these multi-piece rims?"

I said, "Not really. When you take your case into court before a jury, if you present your case fairly, you get justice. This is the way life is." And he left out all that explanation.

Q. Very well.

Did you talk to Mike Wallace after the interview? A. Yes, I did.

Q. What did he say? A. He said, "Mr. Bradley," he said, "you have come on as a red-blooded American just doing his job." He said, "You are one of the best interviews we ever had.", and I felt pretty good because I felt I had done a good job, too.

Q. In your professional opinion, in your conversations with Mike Wallace, did you indicate that single-piece rims are [33] safer than multi-piece rims? A. Never. They are not. What I had told him specifically, I said both the single-piece rim and the multi-piece rims are very, very safe. I said the incidence of failure is so small it would be insignificant, but they are both good parts. I certainly would not say one is better than the other.

Q. Is it your opinion that multi-piece rims are an unsafe product? A. They are a safe product, very safe product.

Q. Did you tell that to Mike Wallace? A. I told that to Mike Wallace.

Q. That is while the cameras were running during your interview? A. That is while the cameras were running.

Mr. Reihart: You may question.

EXAMINATION BY COUNSEL FOR THE DEFENDANT CBS, INC.

By Mr. Williams:

Q. Mr. Bradley, it is a fact, is it not, that multi-piece rims are subject to what is called by people in your business explosive separations? A. This has occurred very rarely and it has not occurred because they are unsafe products, it has occurred because people [34] have mishandled them, have put them together incorrectly, and are unfamiliar with them.

Q. But whatever the cause it is a fact that multi-piece rims are susceptible to exploding and coming apart suddenly under great pressure; is that correct or not? A. Under very rare situations, it is a very rare occurrence.

Q. Regardless of how frequently you say it occurs, it does occur, does it not? A. I don't recall it has ever occurred with a Budd product, a Budd product that we made complete.

Q. Do you not know as an alleged expert in this field that explosive separation has been a problem with multi-piece rims for many years? A. I don't consider this a problem when it is so insignificant and more safe than any other product on a truck.

Q. Do you not agree that you have known about the phenomenon of explosive separations for many years when you were active in the business? A. This has never been a problem with us. It is so insignificant, you know, when you talk about millions and millions of wheels, and the percentage is so—smaller than any other [35] product, you must remember I was in the tire business, the instance of failure with tires is like hundreds of times greater than wheels.

Q. Would you mind just answering my questions, please, directly? And we will get along a lot better. A. Without an explanation?

Q. Without editorializing.

I am trying to find out from you, do you not as a man experienced in the tire and wheel business for many years know as a fact that multi-piece rims were susceptible to explosive separations? A. They are not susceptible to explosive separations. It occurs once in a great while. This is not, as you put it, as though it was one of the things that happens and it is not one of those things that happens, it is not suspectible to explosive separations.

Q. There is nothing in my question that deals with how frequently it occurs.

With that clarification, do you not agree that it has been known for many years by those people who are familiar with truck wheels that multi-piece rims on occasion will explosively separate? [36] A. I think I answered that question quite completely.

Q. Would you answer it directly without—

Mr. Reihart: I object to the nature of the question because it is not a clear question.

What do you mean, "susceptible"?

*Appendix M—Excerpts of John N. Bradley Deposition.*

By Mr. Williams:

Q. Does it not occur that multi-piece rims separate explosively on occasion?

Mr. Reihart: Do you mean if they are seated properly?

By Mr. Williams:

Q. I mean does it not occur. You understand my question and I will stand on the question.

Would you please answer it?

Mr. Reihart: If you can.

The Witness: Very rarely, yes.

By Mr. Williams:

Q. When it does occur, however often it occurs, if a person is nearby and is hit in a vital spot, it can cause death or serious injury, can't it? A. Yes.

Q. You have heard multi-piece rims referred to as suicide rims, have you not? [37] A. I have heard the expression.

Q. One cause of explosive separation of multi-piece rims is improper assembly by a person mounting a tire, correct? A. Correct.

Q. Another cause is mismatching of parts? A. That can happen.

Q. Another cause is using rusted or damaged or excessively worn parts and putting them together? A. That can happen, too.

Q. And it can also happen when a tire that is partially deflated in service is taken into a tire service place and inflated without first being disassembled and reassembled, is that correct? A. If a tire is still partially inflated, I can't believe that the rim would separate. If the tire had been completely deflated and then reinflated it would make more sense to me.

Q. All right.

You have heard, have you not, of explosive separations occurring when a serviceman is reinflating a tire that has previously been put on a rim and inflated? A. I have heard this but it doesn't make sense until that tire has been completely deflated first.

[38] Q. Another cause of explosive separation of multi-piece rims is the sudden deflation of a tire, is it not? A. I beg you pardon?

Q. Sudden deflation of a tire, the air goes out suddenly, would cause the rim to explode? A. I can't conceive of that one.

Q. Have you never heard of that? A. No.

Q. The kind of people who get injured in the explosive separations that you have heard about include automobile mechanics working on truck rims, don't they? A. This happens, yes.

Q. And sometimes it is drivers who are putting air in their tires having stopped along the highway? A. You know, when you say "sometimes," you make it sound as though—I think maybe I have heard of one such case.

Q. You have heard of such a case, however, have you not? A. One case, yes.

Q. Have you not heard of cases where bystanders have been injured, people who were not involved in servicing a truck or putting air in a tire who are standing in a service area or along the highway and have been struck by flying metal from an [39] exploding multi-piece rim? A. When you say cases, I have to say no. I believe I do know of one case there.

Q. You know of one such instance where a bystander was hit? A. Yes.

*Appendix M—Excerpts of John N. Bradley Deposition.*

Q. You do know, don't you, of cases involving occupants of other vehicles along the road who have been hit by flying metal from a multi-piece rim that exploded in a truck along the highway? A. I don't recall such a case.

Q. Single-piece rims, whatever other merits or demerits they have, can't blow apart, can they? A. Well, you have to think of a rim and wheel and tire as a component. If you think about the tire and wheel together, then is when you have a problem with single-piece rims because the tire can blow apart and whether it is the tire blowing apart or wheel blowing apart, it doesn't matter.

Q. Whether that is so or not, is it nor a fact a single-piece rim cannot blow apart? A. The assembly can.

Q. The rim itself, can it or can it not come apart as a [40] multi-piece rim can come apart under pressure? A. I don't know of such a case.

Q. You know of no case where a single-piece rim has blown apart, is that what you said? A. Not the rim itself.

Q. Since a single-piece rim does not have to be assembled in order to mount the tire, a single-piece rim cannot be misassembled, can it, by a tire mechanic? A. When you talk about assembly, you are talking about putting a tire on and the tire can be misassembled on a single-piece rim and this becomes part of the problem?

Q. I am talking solely about the rim and I am asking you to confine your thinking to that.

Since a single-piece rim does not have to be assembled, will you not agree that it cannot be misassembled? A. I don't think you should do that. You got to think of this—you must remember my background is both tires and wheels. It is very difficult for me to think of one without the other.

As a unit, the single-piece rim can blow apart.

*Appendix M—Excerpts of John N. Bradley Deposition.*

Q. Are you unable to answer the question whether a single-piece rim can or cannot be misassembled? A. When you talk about assembly of the rim, the rim is [41] already assembled. The rim is assembled at the factory. So I don't know—when you talk about misassembled, when—the only assembly the customer makes with a single-piece rim is to put a tire on it. He can misassemble disassembly.

Q. But he does not do any further assembly on the single-piece rim than that which is done at the factory, would you accept that as a correct statement? A. Yes.

> Mr. Williams: I should like to have marked for identification as CBS 2 a copy of an inter-office memorandum dated December 4, 1969, on the Budd Inter-Office Correspondence letterhead to a Mr. R. H.—and there is a last name that I am unable to pronounce. Would you pronounce that for me?
>
> The Witness: Vansteenkiste.

By Mr. Williams:

Q. Would you spell that for the Reporter? A. V-a-n-s-t-e-e-n-k-i-s-t-e.

Q. Do you recognize that as a memorandum that you wrote to that gentleman on or about December 4, 1969? A. Yes, I do.

Q. What was your position at the Budd Company at that time?

* * *

## APPENDIX N

### Excerpts of Dr. Roger McCarthy Deposition

* * *

[51] that pose the least risk, or how we can reduce the risk associated with the use of a product.

The whole goal is to prevent or reduce the number of injuries that are encountered with the use of a product, or through a failure of some form, and this whole effort is dedicated to preventing as many injuries and saving as many lives as possible.

Q. Now, Dr. McCarthy, were you ever contacted by anyone from CBS News about multi-piece rims? A. Yes, sir.

Q. And who was that that contacted you? A. The first call I received from anybody at CBS regarding multi-piece rims was a gentleman by the name of Al Morainos (phonetic) who called me in late 1980 with some questions about multi-piece rims.

Q. And what did he say to you when he called? A. He indicated to me that CBS was doing a 60 Minutes segment on multi-piece rims; that he had become aware of the reports of work that I've done in this area; and he wanted to interview me for the series with regard to multi-piece rims.

Q. Mr. Morainos indicated that he had a copy of your Phase 3 Report? A. Yes, and some familiarity with it.

Q. And did you talk to him on another occasion about the Phase 3 Report, or multi-piece rims? [52] A. No. I recollect only one phone call, we could have had two, but in that phone call he indicated a desire to do an interview.

Q. And what did you tell him? A. Well, I told him that was fine, I anticipated no problem. I indicated to him that the work I had done in this matter was done for

the National Wheel and Rim Association, and that Mr. Jeffrey Myers was their attorney.

I believe I had been apprised by Mr. Myers prior to this telephone call that there was a CBS segment in the making regarding multi-piece rims, because Mr. Myers had called me and indicated the segment was in process, and that there may be a request to interview me, that that presented no problem to the N.W.R.A., and that I was merely to put CBS in contact with him for scheduling and the logistical details.

So consequently when I did receive the call from Mr. Morainos, I gave him Mr. Myers' name and telephone number, and indicated that I had—it had been indicated to me there would be no problem and we should set up the interview whenever it was mutually convenient.

Q. In fact, were you ever interviewed? A. No, sir.

Q. Did you discuss any conditions of the interview with Mr. Morainos? A. I think I indicated to him, or may have indicated; [53] although I guess I don't have a specific recollection, that N.W.R.A. may want to film my interview in process so that they had a complete copy of the interview, but Mr. Myers had indicated to me that only as a possibility and not as a hard and fast condition, and I may have indicated that to him. I do not recollect.

Q. Now, did someone else call you from CBS News? A. Yes, sir.

Q. Who was that? A. I was then called by Ms. Jan Lagnito (phonetic) and talked with her about multi-piece rims, and specifically my Phase 3 Report on a number of occasions.

*Appendix N—Excerpts of Dr. Roger McCarthy Deposition.*

We had at least three, and maybe five additional conversations with regard to the results of Phase 3, and the single-piece versus the multi-piece issue.

Q. If you would take all the time that you spent conversing with Jan Lagnito and Al Morainos about multi-piece rims, what—what period would that be? A. I would say it would total somewhere between two and four hours depending on—probably closer to four. Ms. Lagnito and I had a couple of conversations that were interrupted, as I called her from airports and then continued the conversation with another call. On several occasions she called me, and I, in all cases, returned her telephone calls.

Q. Did you discuss the Phase 3 Report with her? [54] A. Yes, in some detail.

Q. And would you explain to the jury what the details were of your discussions? A. Well, there was a significant discussion of Table 6, and the failure mode of the various rim types. There was also—and I explained to her the various differences in designs amongst the rims and why the numbers came out as they did.

Particularly, she wondered, for instance, why the K-rim had had no moving-type accidents, and I informed her the design of the K—a K-type rim couldn't have a moving-type accident, and explained to her why.

We discussed at some length the analysis I did, the data collection, the completeness of the data, and what conclusions could be drawn about the safety of single-piece and multi-piece rims, and I informed her the work that some other people had been doing in this area.

*Appendix N—Excerpts of Dr. Roger McCarthy Deposition.*

Q. What did you tell her about your conclusions concerning safety of the multi-piece rim? A. Well, as I pointed out to her in appendix A, the rim-servicing task certainly has to be regarded as a safe one, and that the rim data we had indicated there was no safety advantage at all to single-piece rims over multi-piece rims. She went as far as to ask me how fast people could change multi-piece rims, figuring that if they could change [55] six an hour, that would get the gross risk to one cha[illegible] million per chance of fatality per hour of exposur[illegible] the servicing task. And I explained to her, for instance, I thought that was a very rapid rate to assemble such rims, but maybe it was possible, but at that rate the risk of rim servicing would then approach that of many other industrial operations.

Q. Did you talk to her about the rarity of these kinds of injuries that occur with the use of multi-piece rims? A. Yes. I explained to her that on a national scale over multiple years, for instance, that many other events that we think of as rare, are much more common than multi-piece rim accidents.

For instance, I explained to her that there had been—we know of approximately a hundred deaths over the last ten years with multi-piece rims, and their spontaneous explosion, or their explosion for some misassembly or overinflation or some servicing error.

I explained to her that in any given year, accident statistics show that 130 people will die from random strikes of lightning, and I think I indicated to her that not only did she not know anybody who had ever been struck by lightning, but she did not know anybody who knew anybody who had been struck by lightning. It was such a rare event that it was almost outside anybody's

personal experience, and yet [56] random lightning strikes kill ten times as many people as all servicing accidents with multi-piece rims. So it just is an incredibly rare event.

Q. And you told that to who was that? A. Ms. Lagnito.

Q. And she identified herself to you as who? A. A researcher for Mr. Morainos, and she indicated that Mr. Morainos gave my name to her.

Q. Did you discuss warning labels with anyone from CBS? A. We discussed the instruction issue on rim servicing at some length. We may have touched on the warnings.

Q. Did you refer Ms. Lagnito to any other person who may have knowledge in the area? A. I referred her to, I believe I mentioned to her that Mr. Gaines, Robert Gaines who was the—doing the study of multi-piece rims and single-piece rims for the National Highway Traffic Safety Administration. He was—he was an engineer with South Coast Technology, and a former truck engineer, and he had been retained by the NHTSA to study the single-piece and multi-piece rim issue, and I knew of his work as I had met with him and provided him all of Failure Analysis' data in an attempt to cooperate with him in his research.

And I knew he had done some surveys of trucking [57] establishments, and had found a rather surprising number of single-piece rim-type accidents, and I suggested she get in touch with him to discuss his results and also that he had had a chance to evaluate the F.A.A. data base, and the Insurance Institute for

Highway Safety data base, and determined the completeness of our accidents which she had some questions about.

Q. What information did you give her about Mr. Gaines? A. I'm certain I gave her his name and I believe his phone number.

Q. Now, you had indicated that you had talked to her about the K-rim, and you referred to a Table 6 in the Phase 3 Report.

Do you have a transparency of the Phase 3 Report there? A. I have some selected pages, Table 6 being amongst them.

It's kind of small print, I don't know whether anybody can read it.

Q. What is—perhaps you can explain what Table 6 is? A. This is a summary table out of the Phase 3 Report.

Mr. Reihart: Maybe we can make it bigger by doing that.

Do you think it's possible for the technician to move the camera closer and pick that up?

[58] The Video Engineer: Yes.

Mr. Reihart: Perhaps you could do it. Could we go off camera until you move the camera.

(Short recess.)

By Mr. Reihart:

Q. Doctor, would you—

The Video Engineer: One moment, excuse me.

*Appendix N—Excerpts of Dr. Roger McCarthy Deposition.*

By Mr. Reihart:

Q. Doctor, would you explain to the jury what you're portraying there on the overhead projector? A. This is a table out of the multi-piece rim report that—Table 6, Phase 3, which dealt with the accidents which we could identify in the data base having occurred to a particular rim type, or rim geometry, and we took the nine most popular rim types and tabled them as far as the number of rim years of use they had received, and exposure, pre- and post-1970, the percent of their age that occurred in 1970 to '78 period, the number of accidents, the accidents per tire changes, the maintenance accidents, the moving accidents, and then totaled them up.

I've shown on the tape there are two-piece rims and three-piece rims and rims of different type, and they have different accident modes, and different experience, and we were attempting to analyze our data base as best we could to—as a check, and as an analysis.

[59] Q. Now, what was her question to you about the K-type rim that you mentioned? A. Well, for instance, in the K-type here, you will note there are 68 accidents indicated, none of them moving. And while some, like the Redco T-type have never had a moving accident either, they have had very, very few accidents, only six. It doesn't seem unusual that there have—for such a relatively few number of accidents there has never been a moving one, since most accidents occur in the shop and not on the road. But to have 68 and no moving, given the numbers for other rim types seemed unusual to her, and I agree. It's a good question.

And, of course when looking—when you understand the K design and how it works it's very understandable. And the K—once the spoke center is put in the wheel it

cannot explode, it cannot ever lose its side ring, and, of course, it always has its spoke center on the road and doesn't explode in that situation.

Q. So, the explosions happen in the workplace, then? A. For that particular rim type, yes, sir.

Q. Is that the nature of the information you gave to her? A. Yes, that and other points of observation in terms of the table and the quantities.

Q. Did you discuss the fact that there were different [60] kinds of multi-piece rims? A. Indeed, different kinds that had different accident experience, as you can see from the table.

Q. Very well. Thank you, Doctor.

Now, have you ever been invited to appear on the CBS television network? A. Yes, sir.

Q. Would you explain that to the jury? A. Recently, as part of the Universe series, Mr. Walter Cronkite of CBS was doing a segment devoted to risk, and risk analysis. And he indicated on the broadcast as introducing the segment dealing with failure analysis, we are perhaps the best known firm in the country in the area of risk analysis, and to do his segment he came out to interview myself and Dr. Ross of this firm with regard to risk analysis and to pose some questions to us.

Q. And you were presented as a person who worked in the field of risk analysis? A. Yes, indeed, in the course of the interview he posed to me a number of questions about risk and safety evaluation and what risk means and how we should analyze it.

Q. Now, did you see the CBS program, Killer Wheels, that was aired on March 8th, 1981 and later on September 6th, 1981 on their 60 Minute show? A. Yes, sir.

[61] Q. Now, what was your evaluation of that show?

Mr. Williams: Objected to.

The Witness: Well, unquestionably from a technical point of view, the show was incorrect in many of its statements that it purported to be factual. It was erroneous in its overall thrust. It was affirmatively misleading in its statements about single-piece rims.

In general, I would say to the extent that it had factual information to convey, a substantial portion of those observations that purported to be facts were just plain wrong.

By Mr. Reihart:

Q. Now, Doctor, have you been provided with a transcript of the CBS show, Killer Wheels? A. Yes, sir.

Q. And did you have a true and correct copy made into transparencies of that show? A. Yes. The photostat machine just makes copies of the transcript.

Q. Would you put page 1 up on the overhead projector, please? A. Yes, sir.

Mr. Reihart: Can you get the whole text on camera?

The Video Engineer: Yes, sir.

Mr. Reihart: Can you read it if you get the whole text on?

[62] The Video Engineer: On a bigger screen you could, yes, sir.

Mr. Reihart: On a bigger screen, okay. If you can take it in as tight as possible and still get the whole text on it—

The Video Engineer: Yes, sir.

*Appendix N—Excerpts of Dr. Roger McCarthy Deposition.*

By Mr. Reihart:

Q. Now Dr. McCarthy—I'm referring now to page 1 of the transcript—the show begins with Mike Wallace making the following statement: (Reading:) "This test film by the Insurance Institute for Highway Safety was made with a 250-pound dummy, but it shows graphically what can happen when a wheel rim explodes.

(Sound of explosion.)

"Unlike the tire on your automobile, which rests on a single-piece rim like this one, the tires on most of the trucks and buses on the road rest on a rim made of two or three pieces, like this one."

Now Doctor, have you been provided with a copy of the value engineering report? A. Yes, sir.

[63] Q. And have you had an opportunity to review that report? A. Yes, sir.

Q. This statement by Mike Wallace while he was making the statement, did you see the film that they referred to as being made by the Insurance Institute for Highway Safety? A. Yes, I had seen photographs of that film prior to the presentation on CBS.

Q. Now, would you explain to the jury what the film—or how the value safety engineers produced the explosion that was shown on the film? A. Well, not indicated by Mr. Wallace in his statement was the fact that no conventional multi-piece rim properly assembled could be made to explode. So, what was done to artificially create the explosion was to take a standard L.B. Budd Company multi-piece rim, which has been a very reliable and a workhorse rim which has a very

positive locking geometry here at the retaining hook and side ring, and machined it in a dramatically different way so instead of having a lock it actually had to—a ramp.

Now, to achieve this, the—I—the value engineers had to go through a number of interratios, machine the rim a number of times, and found that only by removing substantially—in fact, most of the retaining hook of the rim, could they cause the explosion they wanted to film.

[64] Q. Now, is a film of this sort an aid in evaluating the safety of a multi-piece rim? A. Since it involved a film of a rim similar to no other type of existence, I would say no. However, except from this point of view; the fact that the rim had to be modified from this geometry (indicating) to this geometry (indicating) where now I'm going to put these one over the other—where, in fact, instead of being as designed and as built, most of this retaining hook area had to be removed and changed to this geometry where there's a ramp off.

I think it illustrates the tremendous conservatism in the design. It shows that there is a substantial amount of metal, in addition to that minimally required to hold the rim together that exists on this rim type, and I think it's a good indicator of why this rim sees the high reliability it does.

Q. Do you know about the pressures that were used in order to obtain the explosive separation that was demonstrated on the show? A. Yes. The value engineering report indicated that for most of the explosion they got above the rated pressure of the rim, and this, of course, produces a more dramatic film when there's more energy available for the explosion than there actually is in a rim if it were inflated to its rated pressure.

*Appendix N—Excerpts of Dr. Roger McCarthy Deposition.*

[65] Q. Doctor, in evaluating the explosion that was shown of this rim that had been changed or modified to allow the separation, is there anything unique about that multi-piece explosion if we were to compare it with exploding a single piece rim? A. Not in terms of the energy present. If I machine and cut—in fact, recently for the OSHA standard, I was involved in arranging explosions of single-piece rims for the benefit of the OSHA investigators evaluating the new single-piece rim standards, and similar to the multi-piece, we had to cut most of the bead wires on a conventional tire to make it explode at a normal inflation pressure, and so you could artificially doctor a single-piece and, indeed, when a single-piece rim and tire goes, it goes with the same violence and the same explosion because it's just governed by the air in the tire and the energy in both single-piece and multi-piece rims is the same.

Q. In other words, a 250-pound dummy would be thrown around the same way if a single-piece wheel would explode as was shown when the multi-piece wheel exploded? A. He would be definitely thrown around. He would take a different trajectory, and the nature of his injuries would be a little different.

A single-piece rim causes a blast-wave injury that a multi-piece rim does not; but he would be thrown violently [66] away from the tire, yes, sir.

In our tests, a single-piece rim blowing with a bead break flew thirty feet into the air.

Q. What flew thirty feet into the air? A. The rim and tire together, the whole assembly blew up in the air more than thirty feet.

*Appendix N—Excerpts of Dr. Roger McCarthy Deposition.*

Q. So the explosive potential of multi-piece rims is the same in single-piece rims? A. Yes. The energy—all of the explosive potential as a result of the air, they both contain a large amount of highly-compressed air, and they both have high energy.

Q. Okay. If we could—perhaps we could put the next transcript on. We are back on page 1, again.

I think it's —we could go the the bottom of the page. Maybe we could move this just a little bit.

Now, Mike Wallace is stating, (Reading:) "Killer Wheels—that's what many truck driver's and tire mechanics are calling some wheel rims now riding on our highways. The wheel rim is that steel part upon which a tire is mounted. But we're talking here not about the wheel rims on cars; instead, we're dealing only with the [67] wheel rims on trucks and buses and some campers. They are called multi-piece wheel rims, and accidents involving them, according to U.S. government statistics, have killed more than have died in accidents involving the Ford Pinto or the Firestone 500 tire."

Now, based upon your studies and the information you gave CBS, is that a valid statement? A. Well, the application of Killer Wheels implying that there is some degree of lethality or risk associated with multi-piece wheels that is not also present with single-piece wheels is both misleading and technically just wrong.

As Mr. Gaines indicated in the South Coast Technology report, you could survey other truck drivers and mechanics and find people who call single-piece rims killer wheels; and, in fact, in the school bus application there is a high degree of distrust and criticality of single-piece rims because of their accident record in the school bus applications.

Thus, the thrust of the paragraph trying to imply that there is a risk or higher risk with single rims—with multi-piece rims as posed today, it is not misleading, it is wrong. It is corrected by every study that has been done of [68] single-piece rims in this decade, and the last.

Q. And did you provide this information to a CBS representative when they talked with you? A. I was quite emphatic about this point with Ms. Lagnito and invited her to consider the references in the back of my Phase 3 Report on the Bureau of Modern Carrier Safety ultimately the work of South Coast Technology, anybody who has studied the issue knows that is the case.

Q. At the top of page 2, Mike Wallace continues—can you get in closer to that?

The Video Engineer: Yes, sir.

By Mr. Reihart:

Q. (Reading:) "So, there is no surprise that there has been a call to ban these wheel rims from the highways. That is part of our report in which we first broadcasted last spring, but this is also a story about the companies that make these wheels, about decisions made by large corporations in weighing the costs and the benefits of selling potentially dangerous products. And in case you're wondering what an accident involving a truck rim is like, take a look at this.

[69] "(Natural sound from simulated car crash.)

"This test film by the Insurance Institute for Highway Safety was made with a 250-pound dummy, but it shows graphically what can happen when a wheel rim explodes."

*Appendix N—Excerpts of Dr. Roger McCarthy Deposition.*

Now Doctor, is this an accurate representation of how a multi-piece rim performs? A. No. As I've indicated, such a rim had to be artifically created for the film, and had to be of a design that's completely different from any currently used by any multi-piece rim manufacturer, and, in fact, they had to do multiple modifications of the rim to get one to explode.

Q. Continuing with that same transcript, if we go to Ben Kelley who is introduced by Mike Wallace.

(Reading:) "Ben Kelley of the Insurance Institute explains how the accidents happen.

"Ben Kelley: Its design causes a piece of metal, weighing anywhere from ten to thirty pounds, to be held on the outside of a tire that is under tremendous air pressure. And if that metal, for any reason, dislodges, it fires off like a shell out of a cannon into whatever [70] is in the way, which is very often a serviceman's head."

Now, did your studies bear out the accuracy of Mr. Kelley's statement? A. As we indicated, there was tremendous pressure; however, the accuracy fails on the point "if for any reason dislodges." There is no way that a properly assembled rim could dislodge once assembled, rather than saying "for any reason," which is affirmatively misleading. It sounds like it could fall out of place or just spontaneously dislodge.

The only way that spontaneous explosion could occur is, if the components were not worn out, would be if they were improperly assembled and, of course, there is absolutely no mention of that critical part of the accident.

Q. Doctor, could you turn to page 12 of your Phase 3 Report? A. Yes, sir.

*Appendix N—Excerpts of Dr. Roger McCarthy Deposition.*

Q. And is that what you're showing to the jury, a page from your Report which we previously designated as the Phase 3 Report? A. Yes.

Q. This is the report that CBS suggested they had when they talked to you the first time? A. Oh, there was no question. Ms. Lagnito indicated that she had read it completely, in detail.

[71] Q. Okay. Would you point out to the jury a relevant portion of that report that bears upon the statement of design referred to by Mr. Kelley? A. As is shown in the transparency, and where I put a little blue tick mark I indicated that, "The multi-piece design has been recognized, historically, for it's ability to withstand rugged use and high-load pressures, characteristics essential to safe and economic truck operation. Over the years, the two individual components that have undergone numerous evolutionary improvements to accomodate changing truck technology and demands. Such improvements have maintained and often enhanced the two essential characteristics of ruggedness and heavy-load-carrying capacity."

There is no question, even today, that the multi-piece rim is the rim of choice for the rugged use, high abuse applications.

Q. Do you have page 14 that you can share with the jury, please? A. Yes, sir.

Q. Could you identify that as a page from the Phase 3 Report? A. Yes, sir.

Q. And would you share with the jury what your part of the Report says in regard to the locking mechanism of the multi-piece rim? [72] A. Yes. Personally I indicate in that paragraph, "A multi-piece rim, once properly assembled, remains assembled because the components

are designed to interlock mechanically with one another; the design results in a positive metal-to-metal interference fit. All multi-piece rim designs utilize the air inflation load of the tire to increase the interlocking force, although most designs do not require inflation of the tire in order to remain assembled for handling. The basic mechanical principle of using the load being carried to secure a multi-part load-carrying component and insure structural integrity is a proven mechanical principle. It is currently utilized in many areas of mechanical design to interlock two or more components—two or more parts together safely during arduous use, and at the same time, especially in the face of pressure, to provide a simple mechanism for unlocking the system when necessary."

Then I give some examples in common use are: "Radiator caps, quick disconnects on pneumatic tools, and the bolt action of firearms."

Q. Now Doctor, could we go back on the transcript with another transparency. It would be page 2. Again, I'm reading. Mike Wallace says: (Reading:) "Now that means"—in the approximate center of the page— [73] "Now that means that, unlike the tire on your automobile which rests on a single-piece rim like this one, the tires on most of the trucks and buses on the road rest on a rim made of two or three pieces, like this one. One piece interlocks with the other. And when the tube in the tire is inflated, tension is built up between the two pieces. It's when those two pieces fall out of place that the pressure can cause them to separate, to explode."

*Appendix N—Excerpts of Dr. Roger McCarthy Deposition.*

Now, at this time, Doctor, I would like you, if you could, please, to identify the video tape that we had set up there. You have reviewed the video tape on the machine? A. This is a video tape. This is our video tape machine and monitor, and we made a video tape of the 60 Minute program, a portion of which is set up on the machine.

Q. And if everything went right, it will be the passage that I just read. Could you please turn the television set on?

After the cameraman has got the—are you ready?

The Video Engineer: Yes, sir.
Mr. Reihart: That's fine.
The Witness: Ready?
[74] The Video Engineer: Yes, sir.

By Mr. Reihart:

Q. Now, Doctor, is the statement in the portrayal of the explosion on that segment of the CBS program a scientifically truthful statement? A. No.

Q. Would you explain to the jury why not? A. The statement that rim components once clamped with 40 tons of pressure can fall out of place is just—well, not only is it ridiculous, it is wrong. The explosion mode demonstrated on the program was an attempt to illustrate an explosive separation of a RH5 degree-type rim. Were the rim components properly assembled; that is, if they were shown properly assembled in that segment, unless they were worn out, there is very little likelihood that you would ever be able to get that rim to explode before you blew the tire up by overpressurizing

this. Those rim components cannot fall out of place. The structural integrity of that particular assembly, once properly assembled, is complete.

The RH5 degree has been the most popular rim, the most popular multi-piece rim. In fact, the most popular rim of any type ever produced. And once properly assembled, it is rigid and safe.

Q. Now, Doctor, that went by very quickly. I wonder, is it possible for you to rewind that segment and explain to [75] the jury what it is that you have just said with reference to why that was not a valid demonstration. A. I will try my best.

Q. Perhaps you could turn the sound down.

Mr. Williams: I think we should have the sound on if we're going to have the film.

Mr. Reihart: Okay.

The Witness: I don't think I have the right segment.

By Mr. Reihart:

Q. Okay. It's a little—

Mr. Thomas: Why don't you run it forward on the screen, Doctor, until you get the right segment.

Mr. Reihart: That's it.

The Witness: Now, that's approximately where the hooks are shown properly aligned and, then, all of a sudden, spontaneously releasing. That can't happen with a serviceable multi-piece rim, that is, on the RH5 degree-type that is properly assembled.

*Appendix N—Excerpts of Dr. Roger McCarthy Deposition.*

By Mr. Reihart:

Q. Doctor, do you think it would be appropriate at this time to take a break for lunch? I see it is 12:00 o'clock, now. A. At your convenience.

Mr. Reihart: Any objections?

Mr. Williams: No, just can we have some idea of how [76] long we're progressing?

Mr. Reihart: Yeah, I will finish up about forty-five minutes, and then you will have all afternoon and tomorrow, if you want.

Mr. Williams: I can't stay tomorrow. We made arrangements to go home tonight.

Mr. Reihart: Mine will be relatively short. We will go ahead and adjourn and come back here, what, within an hour? About 1:00 o'clock.

Mr. Williams: I would like to. Is there a place nearby that we could go?

AFTERNOON SESSION

(The appearances of all parties having been noted for the record, proceedings commenced at 1:09 p.m.)

The Reporter: The time is now 1:09.

EXAMINATION

By Mr. Reihart: (Resumed)

Q. Dr. McCarthy, I again direct your attention to the overhead projector, and the portion towards the end of the bottom where Mike Wallace is reading, (Reading:) "His son, 23-year-old Spud James, had been married just two months [77] when he suffered permanent brain

damage after a chunk of steel from a multi-piece rim exploded into his head. He can no longer speak and he is paralyzed on one side of his body."

Do you know the facts surrounding the Spud James accident? A. Yes. Discovery is still continuing in that case, but the pattern of the accident has emerged.

Q. Were there facts relevant to the topic which are not stated there in the account—the entire account about Spud James? A. Yes, there were.

Q. What are they? A. Well, if you look preceding that, there is a sentence opposite my pointer that says, (Reading:) "Just last year, at this service station in Clayton, Georgia, three young men stopped to put air in a truck tire."

That would imply, I think to the normal viewer, it states that they just stopped to put air in a truck tire. That is contrary to what happened in that accident.

They stopped with two flat tires on their truck. They proceeded to demount the truck tires from the truck, [78] took them apart, mounted two new tires that they had—two different tires, rather, that they had brought from their home, reassembled, and were airing up the rims.

The individual doing the assembling, Mr. Spud James, one of two individuals doing the assembly, apparently had no experience and no particular training on how to assemble and disassemble multi-piece rims; apparently incorrectly assembled the rim and they exploded.

The reason why we believe they were incorrectly assembled, is after the accident the father went back and reassembled the rims correctly and drove home on the accident-involved rim.

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Thus, I think an extremely important detail in this account, the fact that once again here was a servicing error by inexperienced and untrained personnel that caused an accident, was completely omitted, and now because of the way it's stated, it looks like there is a design problem with the product when, indeed, this was once again a servicing incident.

Q. I direct your attention now further on down the page to the portion at the bottom where Wallace continues: (Reading:) "It was difficult for us to imagine the kind of force behind an exploding wheel rim, but this film produced by Goodyear, one of the manufacturers of multi-piece rims, [79] tells the tale."

And there's a narrator, and the Goodyear film was shown with this commentary: (Reading:) "The sheer power generated by an exploding tire-and-rim assembly is almost unbelievable. Did you know that a tire, inflated to 75 psi, has the power in an explosive situation to hurl a 16-pound bowling ball a full half mile. This is enough force to raise a 3,000-pound car fifteen feet off the ground."

I don't mean to be repetitive, but is that same information true of an inflated single-piece rim? A. Yes. The energy involved in both rim types is substantially similar, and exactly the same statements could be made about a single-piece rim of the same size and display pattern.

Q. Could we go to page 3 of the transcript, please? A. Yes, sir.

Q. Beginning at the top with Mike Wallace who states, (Reading:) "Goodyear and the other manufacturers recognize the hazards connected with

multi-piece rims during deflation or inflation of the tire, [80] but they say accidents occur only when proper servicing procedures aren't followed, and they say accidents involving the rim are extremely rare. But, then Kelley says that's not so, and he has so are reported to the federal government more than a hundred deaths and at least 400 injuries involving multi-piece rim explosions.

"Kelley speaks: But we are reporting what's known, and we have every reason to believe that what's known is just the tip of the iceberg, because no data are collected on these.

"Wallace: And, says Kelley, the accidents often involve innocent bystanders. This test film shows what might happen when an unknowing vacationer tries to put air in the tire on his camper.

"(Explosion)

"Kelley: We know of the—what we call the innocent bystander accident—somebody walking by a service shop or walking by a parked truck and having one of these go. And we know of these [81] so-called freak accidents—which aren't so freak, it turns out—in which the rim flew off and went into somebody's car and—and—and demolished the people inside."

Now, Dr. McCarthy, did you provide contrary data to CBS? A. Yes, sir. In my Phase 3 Report we discussed the risks to the bystander on a couple of pages. First, the risk of a moving accident, and these are auto accidents or vehicular accidents caused by the failure of various vehicular subsystems, and you can see rather than singling out the multi-piece rim which is shown by the lowest total in every one of these columns, the multi-piece rims—rim obviously should have been singled out

for praise or commendation because it obviously contributes much less to moving automotive accidents than failures of almost every other vehicular subsystem.

In fact, we state in the Phase 3 Report that of the tire, the rim, and the lug nut system that holds the tire and rim to the axle, the rim is far and away the most reliable component.

Q. Now, do you have other information on there that suggests there are other parts of the vehicle that are not so reliable? [82] A. Well, are less reliable than the rim? Certainly, almost everything else. The other columns are: Wheels; Steering; Lights; Brakes; almost every other vehicular subsystem probably makes greater contribution to accidents than moving failures of single-piece rims.

Q. Now, the chart that we have on the overhead projector is page 19 from your—

You mean—I think you made a mistake, you mean moving—you're talking about multi-piece rims? A. That's right. The contribution of moving accidents to multi-piece rims—by multi-piece rims is extremely small.

Q. Do you have with you also Appendix A-1 of the Phase 3 Report? A. Yes, sir.

Q. And would you explain to the jury what that is? A. This is just a list of activities, each of which participation carries with it the risk of one-in-a-million chance of fatality per hour of exposure.

Q. And would you explain what that means? A. Well, for instance, smoking one-point-four cigarettes increases your chance of death by one-in-a-million every time you do that.

*Appendix N—Excerpts of Dr. Roger McCarthy Deposition.*

Now, admittedly, one-point-four cigarettes isn't a lot of cigarettes; however, one-in-a-million chance of death is a very small risk, but if you look at drinking a half liter [83] of wine, traveling six minutes by canoe, traveling ten minutes by bicycle, each of these activities carries with it a chance of one-in-a-million chance of fatality.

To compare the risk of servicing single--multi-piece rims, the bottom two categories deal with servicing multi-piece rims before the OSHA standard, and after the OSHA standard, according to our calculations at the time since enactment of the OSHA standard, the study done by the OSHA of decrease in accidents verifies that the final line to that table is, in fact, correct and it's an accurate statement of the risk of servicing after enactment of the OSHA standard.

Now, this doesn't deal at all with the moving accident situation that Mr. Wallace referenced in his preceding statements, because moving accidents and injuries to innocent bystanders in traffic or in a servicing situation are extremely rare. And, in fact, we have reviewed all of the data assembled by the Insurance Institute for Highway Safety on their knowledge of accidents to innocent bystanders, and they can't find a dozen in the whole nation in the last ten years.

Now, to call this extremely common is just ludicrous.

Q. In other words, the statement that they aren't so freak, the statistics don't bear that out? A. Not at all. In fact, you're talking about incidents [84] that happen with lower frequency than deaths from smallpox vaccinations, from adverse allergic reactions, and things of this nature. I mean, you're down to a miniscule level.

*Appendix N—Excerpts of Dr. Roger McCarthy Deposition.*

Q. What about the statement by Ben Kelley that this is only the tip of the iceberg, this 400 injuries that he reported, and 100 deaths? A. Well, that could only be true if you believed that we don't put any value on human life in this country, or value on human suffering. It works out that that is contrary to the case.

The death or injury of an individual is not an insignificant event with no notice, or no consequence being given to it. Every time an individual is injured or killed in this country, a lot of notice is given to that, and justifiably so.

We place a high value on human life. We have assembled all of the available accident data on fatalities, and we find that fatalities are at least, on the average, reported twice to the various sources that we reviewed.

In other words, when we find a fatal accident, we find not one report of it, but at least two, and as many as ten reports in the different data bases of single fatal accidents. To say that there are a large number of fatal or serious injury accidents that go just unnoticed in this society is just contrary to fact.

[85] Obviously, someone has no comprehension of the litigation climate in this country, where a lawsuit is very often filed for a serious injury. We just don't ignore death and injury.

Q. Perhaps we can now go back to page 3 of the transcript.

Now, on page 3 of the transcript continuing with Kelley,

(Reading:) "Now, the irony is that there is an identical design in which all of the metal is combined—the single-piece wheel, in which it's all in one piece. There's nothing separate from the wheel."

Wallace responds, "Right."

(Reading:) "Kelley: And that can be used for almost every size of truck that operates over the road today."

Doctor, based upon your studies in the context used, considering the statements that precede it, is this an accurate statement? A. On the contrary, it involves numerous errors.

Q. Okay. Now, would you explain to the jury what those errors are, please? A. All right. Can I put this up? I'm sorry, now [86] specifically—

Q. We're dealing with the statement about the—"Now, the irony is that there is a—an identical design in which all of the metal is combined"— A. I'm sorry.

Q. —"the single-piece wheel, in which it's all in one piece. There's nothing separate from the wheel."

Wallace says, "Right."

Kelley, "And that can be used for almost every size of truck that operates over the road today."

In the context given, is that an accurate statement? A. No. In and of itself the statements are technically correct. A single-piece rim is a single piece of metal. Of course, the implication given by the context is that there wouldn't be accidents or injuries if bulk—the rim of the truck were of a single piece of metal. And every study done by every authority on that subject since the issue has been raised contradicts that statement.

Q. Now, did you give this information to CBS when they called you? A. Yes, sir.

Q. Now, turning again to page 3, Wallace continues,

(Reading:) "Why, then don't truck drivers prefer the single-piece to the multi-piece [87] rim? Some say it is

because it is much more difficult to mount and service the single-piece, and it is for that reason, say the manufacturers that its entry onto the market has been slow. But back to multi-piece rims."

Doctor, do your studies and the information given to CBS show this to be a fully factual statement?

Perhaps you can look at page 13 of your Phase 3 Report. A. In page—on page 13 of the Phase 3, where I've indicated with highlights the section of interest, we find that there are very sound engineering reasons not just connected with servicing, that makes the multi-piece rim the correct choice for some applications, not only for reliability but from safety.

Viewing the paragraphs in Phase 3, we state on page 13, "For example"—in rugged—this sentence refers to the rugged haulage operation of rims and tires—

(Reading:) "For example, both the tube tubeless tire bead can be jolted away from the rim by hard impacts. This jolting can cause the tubeless tire to loose air, while the multi-piece rim and tube and tube tire remain inflated. This is because [88] the air integrity of the tube-type tire is maintained by a tube, while the tubeless tire it depends solely on the tire bead remaining in contact with the rim surface or bead seat."

So clearly, in the hard-jolt situation there is a preference based on just the engineering reason that a multi-piece rim has a tube and higher air integrity, and thus is the choice of most truckers' application—most truckers in that application.

We go on to say in Phase 3,

(Reading:) "Another reason for strong preference for the multi-piece rim in hard service is maintanence. Hard

service can chew up tires quickly. Changing a tire on a multi-piece wheel in the field requires a minimum of tools, and can be done with ease and very quickly. The tire changing—the tire changing machine, realistically required for most single-piece rims, is not always available."

This second reason does relate to the statement that Mr. Wallace made, but is only a partial reason. And neither of these sections address safety advantages the multi-piece rim has seen in particular applications like [89] school buses where the multi-piece rim is a far safer rim, having shown itself to be a far safer design for that application, and is the rim of choice by school bus fleets.

Q. And perhaps we can go back to the transcript again. On page 3 Mr. Wallace continuing,

(Reading:) "The tire makers insist that if multi-piece rims are inflated in a safety cage like this one, accidents will be prevented. But it turns out that a good number of accidents occur after the tire is inflated and out of the cage. That is how Mary Ehmann's son, Eric, was killed after his boss told him to repair a truck tire."

Wallace—Mary Ehmann speaks,

(Reading:) "Hm-mmm, he inflated it, took it out of the cage, rolled it across the floor to lay it down beside the truck, and when he laid it down, the impact—

"(Slaps hands)—

"of hitting the floor—apparently something wasn't quite right, or maybe there was a piece of rust or something."

Now, Doctor, do your studies in the Phase 3 Report show that a good number of accidents happen outside of the cage? [90] A. Accidents do occasionally, on a minority of situations, happen out of the cage.

*Appendix N—Excerpts of Dr. Roger McCarthy Deposition.*

Q. Do you know the facts surrounding the Ehmann accident? A. Yes. Mrs. Ehmann has shown up at OSHA hearings where we have given the benefit of our analysis to OSHA. In fact, she showed up to the one prior to the multi-piece rim-servicing enactment. And there, she pleaded for the OSHA standard as well, and made it very clear that the cause of her son's accident was that he had not been trained. In her statement, he had never serviced a single-piece—a multi-piece rim before in his life. He did not know how to service it and, as a result of improper servicing, he was injured and killed.

Thus, the point of Mrs. Ehmann's accident—son's accident is once again the same, that it is the improper servicing technique.

The cases like Mr. James', Mrs. Ehmann's, are related to the same thing, improper training and improper servicing, but in this context are given the implication that there is some design problem with the product.

Q. In the Spud James case, would a cage have prevented that injury? A. If it had—if Mr. James had used a cage, which he did not, any injury he suffered we would expect to be [91] substantially less or not at all.

Q. If we could go perhaps to page 4 of the transcript, to the middle of the page.

(Reading:) "Gary Gardner: They could very easily have stamped a warning on these pieces. Just say do not handle, danger. You know, these things will kill you if you don't have the required knowledge to assemble them. Their obvious defense was, as they have tried to defend in all the cases, that when you stamp those things on the rim, you create stress points. And our engineer said that's poppycock. They don't have any trouble stamping their name on it.

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"Wallace: The jury awarded Clifford Griggs more than a quarter million dollars, after Gardner contended that Firestone, the manufacturer of the rim, had a duty to print a warning on each rim telling users about the risks involved in assembling them. It's interesting to note that after the Griggs decision, Firestone did consider putting warning [92] labels on multi-piece rims. One internal memo says: As interpreted by the government and the courts, we do have a duty to warn. And goes on to say, we would not want to use the word kill as this would have a negative reaction from our customers. Firestone and Goodyear even went so far as to write sample warnings but they didn't use them."

Doctor, is the use of warning labels as recommended by Mr. Gardner proper from a risk analyst's viewpoint? A. No, sir. Obviously Mr. Garnder doesn't have to bear the consequences if his warning is incorrect and misleads people as to how the rim should be serviced, or what servicing techniques should be employed to properly service the rim.

Anybody, like myself, who's concerned with the study and prevention of accidents knows that putting a printed label on an object is not the way to reduce accidents.

The way you do it is through improved training and supervision of those individuals doing the task.

The obvious problem, for instance here in San Francisco, of the fact that a significant portion of our population speaks Spanish, I assume Mr. Gardner might advocate putting a Spanish and English warning, and then [93] he's ignored the Chinese community in San Francisco, and so on.

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The warning label which has yet to demonstrate on ny product the ability to prevent accidents has no scientific basis yet to assert that it will improve the product safety. Instead, we know that improved procedure and supervision of doing the task will affirmatively improve safety, and I think we have seen, as a result of the OSHA standard, that our predictions have borne out; as a result of improved servicing techniques, not labeling, we've seen a dramatic reduction in accidents.

Q. Doctor, do your studies show that there can actually be affirmative danger from putting warnings on products such as multi-piece rims? A. Any basic communication theory would indicate that if you put a warning on a product, and it misleads the individual into thinking he now has enough information as a result of reading your label to properly service the product, you may affirmatively mislead such an individual and actually increase the number of accidents that occur.

Q. Did you discuss the warning label issue with Janet Lagnito when she called you? A. I discussed the overall training issue. I believe we touched on the warning issue somewhat.

Q. Now, addressing the transcript again on the bottom [94] of the page, Wallace continues,

(Reading:) "There are four major manufacturers of multi-piece rims: Firestone, Goodyear, the Budd Company, and the Kelsey-Hayes Corporation. We asked them to respond to our questions for this broadcast, but for various reasons, including their involvement in numerous lawsuits over multi-piece rim accidents, they declined."

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And then on the next page.

(Reading:) "Firestone, however, did tell us that accidents involving multi-piece rims are so rare that they just don't merit this kind of attention."

Now, did Phase 3 cover the rareness of multi-piece accidents? A. Yes, sir.

Q. And was this told to CBS? A. Yes, sir.

Q. Perhpas you can put page 5 up there. There's a statement up there that they are rare—that Firestone said they are rare, was addressed in the Phase 3 Report? A. Indeed. In fact, in—we mentioned the fact that a hundred fatalities occur from lightning strikes a year, in Phase 3 to give a comparison and perspective on just how rare [95] accidents and fatal injuries involved with the servicing the wheels are.

Q. Now, do you have a page available for use with the overhead projector that deals with that subject? A. Yes, sir. In Phase 3 we stated the following—at the top of the page just above the blue mark, I indicate that even after review of all the data including that owned by I.I.H.S., there has only been "three fatal injuries to automobile drivers, and one fatally injured pedestrian" in the last—in the eight-year period covered by the study, '70 through '78. Thus, the statement about the high frequency or lack of rarity of these accidents is absurd.

The article—the section of Phase 3 goes on to state,

(Reading:) "During this period of time, there were 25 trillion miles of tire travel. It is difficult to find safety-related data on events of this rarity, but some comparisons are possible. For example, in an average year, one hundred fatalities occur from individuals being struck by lightning. Multi-piece rim injuries occur with

substantially less frequency than this type of accident. As another example, [96] pressurized multi-piece rim vehicular accidents occur with less frequency than practically all other known vehicular component failure injury mechanisms."

This being the case, it—and since there is absolutely no data to the contrary, even that data owned by I.I.H.S., it is—these statements are just incredibly wrong.

Q. I would like to have you turn to page 7 of the transcript if you can. And at the top of the page where Wallace speaks,

(Reading:) "It turns out that these were not the only doubts the industry was having about multi-piece rims. There is this report written by two engineers at Goodyear's Motor Wheel Division: The parts are inherently dangerous, both on the highway and in the shop. It says: 'When in use, the dangerous condition is often masked.' And it goes on: 'Any positive action to get parts out of use will probably result in more liability suits and higher damage awards. But at the same time, it should reduce the number of accidents.' " Do your studies show whether or not it is fair to [97] take these two statements and characterize them as relevant in assessing the safety of all multi-piece rims? A. Well, certainly it is not relevant or valid for a number of reasons.

Q. Would you explain them? A. First of all, I think there was—there were various people in the industry who have thought, or who have questions about the safety of several types of rims, but after we completed the Phase 3 and Phase 4 Studies, and assembled all the available accident data, such individuals have been able to

understand the safety and now believe their previous questions about the safety of various components have been answered.

And there is not a safety problem with the rim, and we can't say if these individuals now had access to the full data, they would still hold these opinions.

But second and perhaps more important, Goodyear and other manufacturers make rims of varying different designs. And the different designs do have different accident frequencies. To take statements made at one time by two engineers for any reason—and of course, we don't know if those statements are correct or accurate, and in retrospect they may be quite inaccurate—to take them and—about one rim design by one manufacturer and to characterize them as valid about all multi-piece rim designs, I am fairly [98] certain exceeded the original intent of the authors, and is just definitely misleading.

Q. Let's go back to page 7 of the transcript. And we will start with the continuation by Mike Wallace.

(Reading:) "But the question remains: If multi-piece wheel rims are so dangerous, why hasn't the U.S. Government ordered them off the road? Well, it turns out that the government's hands may be tied, for although the government is looking into a ruling that would ban future production of all multi-piece rims, the federal statute of limitations forbids the mandatory recall of most of the RH5 wheel rims, because they were manufactured so long ago. Therefore, the responsibility would seem to fall upon the manufacturers.

"Joan Claybrook: Absolutely.

"Wallace: Joan Claybrook, former head of the National Highway Traffic Safety Administration.

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"Claybrook: It falls upon the manufacturers. And you haven't asked me if I were the manufacturer would I recall this, and [99] I think that the answer is that it's the only ethical thing for the manufacturers to do.

"Wallace: Why do you think they refused?

"Claybrook: If they were to anow—acknowledge a defect by recalling this wheel, then that would be used against them in those product-liability cases. And it is, in most cases such as this, a financial decision by the manufacturer.

"Wallace: So, it comes down to money versus human life?

"Claybrook: There's no question about that. It comes down to that in the manufacture of cars today. Cars are not manufactured as safely as they can be, and the answer is money. That is the reason why not, and even though it's pennies in many cases."

Now, Doctor, your studies show, first of all, what human lives would be saved by banning all multi-piece rims? A. Well, I think we can make an evaluation of the potential lifesaving by looking at the relative accident frequency we have had from multi-piece and single-piece rims, [100] and the data we have reported in Phase 4.

By comparing the accident rates of the two rim types, we have seen on a per-rim basis that at least on the data available so far, the accident rate on single-piece rims is higher than on multi-piece rims. Thus, the substitutions, the banning of single-piece rims for multi-piece rims, would certainly not at this point, based on the available data, have any positive impact on safety, and may actually increase the number of injuries we see from wheel and rim accidents.

*Appendix N—Excerpts of Dr. Roger McCarthy Deposition.*

Certainly the use of single-piece rims in some accidents like those on school buses, we would expect to increase significantly.

Q. What about the statement by the former head of the National Highway Traffic Safety Administration? What does your research show concerning that? A. Well, I don't know whether it's a memory problem or what on Miss Claybrook's part, but a study was commissioned by the agency she headed to determine the engineering and cost effectiveness of switching multi-piece for single-piece rims. And that contract was let to South Coast Technology, Incorporated which issued its final report.

Q. What was the date of the report? A. February 6, 1981. Now, in this report which was let to make an engineering determination independently for NHTSA of the cost effectiveness and the desirability of [101] switching multi-piece for single-piece rims, the various accident frequencies are both studied and a final conclusion is drawn by authors in terms of what they can say now about the desirability of switching single-piece for multi-piece rims, and the cost-effectiveness that Ms. Claybrook discusses.

They state, and I quote—and this is after a long discussion of accidents they had found with single-piece rims on a field survey they had conducted—quote, (Reading:) "While incidents such as these do not constitute a statistical base of any nature, they do seem to indicate that a thorough and critical investigation of single-piece rim, tubeless tire wheels is required before an adequate assessment of cost-effectiveness can be made."

*Appendix N—Excerpts of Dr. Roger McCarthy Deposition.*

This is in a preceding discussion of single-piece rim accidents where they state, quote, (Reading:) "It would appear there are a substantial number of single-piece incidents occurring in the field."

Now, as a result of our studies and the studies that the NHTSA independently commissioned, it was decided it was not desirable to replace or mandate the replacement of [102] multi-piece rims with single-piece rims. It was not a cost decision made by the manufacturers, but an objective decision made on the basis of the available data which showed it was not a wise decision to make.

Q. And this information that you've given to the jury comes from a report that was prepared by whom? A. This was prepared by South Coast Technology at the request of the National Highway Traffic Safety Administration, the agency Ms. Claybrook headed.

Q. Now, on page 8 of the transcript—perhaps we can put page 8 up here.

At the top Mike Wallace says, (Reading:) "Since we first broadcast this report last March, Ben Kelley's Insurance Institute for Highway Safety has reported 28 additional accidents, including eight deaths due to multi-piece rim explosions. Still, the Reagan administration has announced plans to drop a proposed rule that would ban all future production of multi-piece wheel rims. The reason? A conversion from multi-piece wheel rims to single-piece would cost the industry upwards of 300 million a year."

[103] Doctor, is that an accurate statement? A. Well, it does not appear so. The Reagan administration's expert, in this case the National Highway Traffic Safety Administration's expert, South Coast Technology, put

forward the $300 million estimate, but at the same time, in no uncertain terms, discussed the accident frequency and accident rate problem, with single-piece rims, and indicated until a study has been done of single-piece rims, you could not access the cost-effectiveness of the desirability of this substitution. Given the fact that even the expert opinion contracted for by Ms. Claybrook's agency indicated that this would not be a wise decision, to attribute this decision to the $300 million a year cost—which, of course, would be borne by consumers anyway—is misleading and also inconsistent with the data upon which that decision was based.

Q. If the multi-piece rims were banned, are there any pieces—persons or organizations that would profit from such a ban? A. I think we can see there would be several categories of people that would profit from such a change.

Q. Who would that be? A. Well, not trying to be exhaustive, but clearly there would be a number of plaintiff attorneys who would profit because it would make recovery in litigations easier. [104] I'm very confident of that. But additionally, certainly the manufacturers of multi-piece and single-piece rims would profit from a major switch over not caused by wear-out.

And in this country most of the manufacturers of multi-piece rims also manufacture single-piece rims, so they undoubtedly would be—would profit by the switch. And additionally, some insurance companies would obviously profit from such a banning because they would not have to honor their insurance policies that were enforced for a recalled product.

*Appendix N—Excerpts of Dr. Roger McCarthy Deposition.*

Q. Are there people in society who would be harmed by a banning of the multi-piece rims? A. Well, I think there would be. Obviously, the cost of such a switch-over would have to be borne by the society as a whole, and it would cost people more for everything they transported.

We don't have the capability in this country to immediately change our fleet of multi-piece rims with single-piece, and there would be rim shortages and higher costs associated with transportation, at least in the short term. And in those applications where the multi-piece rim has not shown itself—Where the single-piece rim has not shown itself to be as safe as the multi-piece rim, we would run the further cost of decreased safety, and more accidents.

Q. Dr. McCarthy, in your opinion, is the Redco [105] multi-piece rim, which you explained to the jury here today, a safe product? A. Yes, sir.

Q. Now, based upon your experience as an engineer, graduate of M.I.T. with a Ph.D., who acted as a risk analysis, based upon your studies of the multi-piece rim and your studies and knowledge of the single-piece rim, do you have an opinion as to the technical accuracy of the CBS 60 Minutes program, entitled "Killer Wheels," that was shown on March 8th, 1981 and September 6th, 1981? A. Yes, sir.

Q. And what is that opinion? A. Well, from a technical point of view, the factual data contained is substantially incorrect. The overall direction, thrust and statement of the program would have to be termed deceptive because it misleads the public as to the true

safety and the true benefits of multi-piece rims. To the extent that such a program causes people to be misinformed, and to make incorrect choices about rims and about transportation choices, and which rims to use, it could lead to increased accidents and increased danger on the roadway; and rather than being an aid to safety, it could work to decrease safety in this country.

Mr. Reihart: You may question.

Supreme Court, U.S.
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No. 85-28

IN THE
# SUPREME COURT OF THE UNITED STATES

October Term, 1985

REDCO CORPORATION,
*Petitioner*,

*v.*

CBS INC. and THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY,
*Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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## PARTIES TO THE PROCEEDING

The parties to this proceeding are Redco Corporation, CBS Inc., and the Insurance Institute for Highway Safety.

Excluding its wholly-owned subsidiaries, the following companies are subsidiaries or affiliates of CBS Inc.: April Music Publishing Company (Proprietary) Limited; Entertainment Distributors Company Pty. Limited; Music Publishing Co. of Australia Pty. Limited; CBS Catalogue Partnership [Limited Partnership]; N.S. Beaujolais Music, Inc.; N.S. Justinian Music, Inc.; Golden Apple Music, Inc.; CBS Affiliated Catalog Inc.; CBS Feist Catalog Inc.; CBS Hastings Catalog Inc.; CBS Miller Catalog Inc.; CBS Robbins Catalog Inc.; CBS U Catalog Inc.; CBS Unart Catalog Inc.; CBS Variety Catalog Inc.; United Artists Music (Australia) Pty. Limited; United Partnership Limited; United Artists Music (France) S.A.; United Artists Musik GmbH; Phonix Musikverlag GmbH; United Artists Music (Nederland) B.V.; Edizioni Musicali United Artists (Italy) S.r.l.; Resolute Casa Editrice Musicali S.r.l.; United Artists Music Japan Inc.; United Artists Musikforlag AB; United Artists Music (South Africa) Pty. Limited; Grammofonselskabs Distributions Centralen A/S; CBS Epic (Thailand) Limited; CBS Music (Thailand) Limited; CBS/FOX Company, The [General Partnership]; CBS/FOX VIDEO (Holdings) Ltd.; CBS/FOX VIDEO Limited; CBS/FOX VIDEO (Germany) GmbH; CBS/FOX VIDEO (South Pacific) Pty. Ltd.; CBS/FOX VIDEO (Canada) Ltd.; CBS/FOX VIDEO (Espanola) S.A.; CBS/FOX VIDEO French Film Licensing Corp.; CBS/FOX VIDEO (France) S.A.; CBS/FOX VIDEO International S.A.R.L.; CBS/FOX VIDEO (New Zealand) Limited; CBS Gramophone Records and Tapes (India) Limited; CBS Disques S.A.; CBS Electronics Ltd.; Editions CBS Songs S.A.R.L.; CBS/MTM Company [General Partnership]; CBS Records Chile Ltda.; CBS Records (Kenya) Limited;

PEC Musiikkitukku OY; Music Service Center Gesellschaft m.b.H.; CBS/SONY Group Inc.; SD Kansai Inc.; CBS/SONY Inc.; CBS/SONY Family Club, Inc.; CBS/SONY Records Inc.; April Music, Inc.; CBS/SONY California, Inc.; Digital Audio Disc Corporation; EPIC/SONY, Inc.; CBS/SONY Hong Kong Limited; CBS/Sony Publishing Inc.; Japan Record Distribution System, Inc.; Music Plaza, Inc.; SD Hokkaido Inc.; Shorewood Packaging Company Limited; CBS Songs Music Publishing Co. Ltd.; Editora Melograf Ltda.; Melograf S.A.; Fender Japan, Ltd.; Gramophone Record Company (Proprietary) Limited; Ideal Toy Company of Canada, Ltd.; Igaku-Shoin/Saunders Ltd.; Shorewood Packaging Corp. of Canada Limited; Trintex [General Partnership]; and Tri-Star Pictures [General Partnership].

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IN THE

# SUPREME COURT OF THE UNITED STATES

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October Term, 1985
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REDCO CORPORATION,

*Petitioner,*

*v.*

CBS INC. and THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY,

*Respondents.*

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## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents CBS Inc. and the Insurance Institute for Highway Safety respectfully submit that Redco Corporation's petition for a writ of certiorari should be denied. The decisions of the courts below correctly applied the law of Pennsylvania to this case, and Redco has raised no question of federal law that merits review of those decisions by this Court.

## CITATIONS TO THE OPINIONS BELOW

The opinion of the district court directing entry of summary judgment in favor of respondent CBS Inc. (A. 117-52)* is reported at 10 Media L. Rep. (B.N.A.) 1536 (M.D. Pa. 1984). The opinion of the district court directing entry of summary judgment in favor of respondent Insurance Institute for Highway Safety (A. 155-58) is not reported. The opinion of the court of appeals (A. 163-67) is reported at 758 F.2d 970, 11 Media L. Rep. (B.N.A.) 1861 (3d Cir. 1985).

## STATEMENT OF JURISDICTION

The judgment of the court of appeals (S.A. 8-9) was entered on April 9, 1985. A petition for rehearing was denied on May 7, 1985 (S.A. 10), and a certified copy of the judgment was issued in lieu of a formal mandate on May 15, 1985 (S.A. 9). The petition for certiorari was docketed on July 5, 1985. Jurisdiction is based on 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions cited by petitioner, the state law questions petitioner seeks to present to this Court also involve application of the Pennsylvania Bill of Rights, Pa. Const. Art. I § 7, and the Pennsylvania Shield Law, 42 Pa. C.S. § 5942. The text of these provisions is set forth in the supplemental appendix at S.A. 23.

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* In a number of respects, the petition for certiorari fails to comply with the rules of this Court, and, for the convenience of the Court, respondents have sought to correct those errors in this document. The errors include failure to place in the appendix some of the items required by Rule 21.1(k), and respondents therefore are attaching to this brief a supplemental appendix containing those items. References in this brief to petitioner's appendix are preceded by "A," and references to respondents' supplemental appendix are preceded by "S.A." Respondents submit that petitioner's failure to comply with the rules of this Court provides an additional reason why the petition should be denied. *Cf.* S. Ct. R. 21.5.

## STATEMENT OF THE CASE

Petitioner Redco Corporation brought this action to recover for product disparagement, defamation, interference with contractual relations, and civil conspiracy. A. 1-24. Each of those claims was based on state law, and federal jurisdiction was based on diversity of citizenship. 28 U.S.C. § 1332. The district court reviewed each of Redco's claims and applied Pennsylvania law to dispose of them. A. 127-52. The court of appeals affirmed without dissent and denied a petition for rehearing in banc. A.163-67; S.A. 10. Redco's petition for certiorari raises no question of federal law warranting review of those decisions by this Court.

Redco's claims are based on a 1981 broadcast on *60 Minutes*, a program produced and broadcast by respondent CBS Inc., of a report entitled "Killer Wheels." That report, a transcript of which is reproduced at A. 25-38, discussed the dangers of multi-piece rims used on the wheels of trucks and other large vehicles. The rims consist of interlocking pieces of metal that are held together by the air pressure in tires mounted on them. S.A. 11; *see generally* Occupational Safety and Health Administration Standard, Servicing Multi-Piece Rim Wheels, 45 Fed. Reg. 6706 (Jan. 29, 1980). If the rim pieces separate because of servicing errors, mismatching of parts, improper assembly, or other reasons, the air pressure can propel the pieces outward at great force. From 1970 to 1978, these explosive separations caused 368 injuries and 89 deaths. S.A. 13-15. The rim dangers gave rise to a series of legislative and administrative proceedings to restrict or regulate use of the rims, including consideration by the National Highway Traffic Safety Administration ("NHTSA") of whether the rims should be banned. S.A. 18-21.

The CBS program about the rims was aired in March 1981, while NHTSA's proposed ban was pending. The

program reported the accidents and deaths caused by the rims, noting three case examples. In discussing the potential for injury, the program showed part of an interview with Ben Kelley, an employee of respondent Insurance Institute for Highway Safety ("the Institute"), who discussed how the rims cause injury and stated that the actual number of injuries may be greater than the number reported. A. 28, 30-31. It also included part of an interview with the former administrator of NHTSA, who commented that recall of the rims is "the only ethical thing for the manufacturer to do." A. 38. The program never mentioned Redco, but it named four other manufacturers of the rims and reported the manufacturers' position that rim accidents are statistically rare. A. 30, 33. A former executive for one of the four other companies repeated that position in an interview. A. 34-38.

Redco sued on March 3, 1982. It contended that the CBS report and Kelley's statements during the report presented a distorted view of multi-piece rims that made them appear dangerous when, in Redco's view, they are not. A. 1-23. After a series of depositions and other discovery, CBS moved for summary judgment based largely on the defenses of truth and opinion. Redco responded that summary judgment was not appropriate because it needed to obtain through discovery materials that were protected from disclosure by the Pennsylvania Shield Law, 42 Pa. C.S. § 5942, and were relevant to the question of actual malice. The district court ruled that it would consider permitting further discovery by Redco, but only if Redco could show that the discovery would be relevant to the issues raised in the summary judgment motion, which did not include actual malice. S.A. 1-7. Redco then sought no discovery relevant to the motion.

Pursuant to a local rule of the district court, CBS filed a statement of the uncontested facts on which its motion was based and Redco filed a counterstatement that, as disclosed in a side-by-side comparison presented

to the district court (S.A. 11-22), reworded or elaborated on the CBS fact statements, but did not dispute them. After reviewing those statements, as well as affidavits, documents, and discovery materials, the district court determined that no fact material to the issues raised by the summary judgment motion was in dispute. A. 136, 142-43.

The court held that, although the program did not mention Redco, it might be considered "of and concerning" Redco under Pennsylvania law relating to libel of small groups. A. 128-32. Even assuming that that was the case, however, the court held that Redco could not recover for product disparagement or defamation because every statement in the program of which Redco complained either was true or, under Pennsylvania law, was a non-actionable opinion based on disclosed true facts. A. 137-42. The court stated that the program as a whole might have implied that multi-piece rims are dangerous and that their manufacturers are unethical, but it held that each such implication was an opinion for which there could be no liability and as to which the facts on which the opinion was based were undisputed and true. A. 143-49. Finally, the court held that Redco had not asserted viable claims for interference with business relations or conspiracy under Pennsylvania law. A. 149-52.

The Institute subsequently filed its own summary judgment motion based on the "law of the case." Redco responded with a series of affidavits, proposed findings, and other materials (A. 39-116). The district court held that, even if those materials were to be considered, summary judgment against Redco still should be granted on the basis of the court's prior opinion. A. 155-60.

The court of appeals affirmed, largely adopting the reasoning of the district court. A. 161-67. Redco filed a petition for rehearing, which the court of appeals denied. S.A. 10.

## ARGUMENT

### Summary of Reasons for Denying the Writ

There is no reason for this Court to review this case. Redco has identified no question of federal law for this Court's consideration. Instead, it has argued that this Court should review the lower courts' determinations of state law and undisputed facts, hardly an appropriate task for this Court.

Each of the specific questions posed in Redco's petition is without merit. There is no basis upon which this Court should declare that a broadcasting company such as CBS has no right to state its opinion on an important question of public safety, or that Pennsylvania may not, as a matter of state law, establish protection for such opinions in defamation cases. The lower courts' holdings concerning the truth of specific statements in the broadcast were based on an in-depth assessment of the factual record which does not call for further review here. The issue concerning which party has the burden of proving truth in Pennsylvania is of no relevance here because the lower courts found that there were no disputed factual issues with respect to the truth of any of the statements. Finally, there is no reason for this Court to review the district court's discovery orders because they did no more than restrict discovery to the issues raised on the summary judgment motions and to fit discovery within the requirements of Pennsylvania law.

## I. THIS CASE PRESENTS NO FEDERAL QUESTION OR OTHER IMPORTANT CONSIDERATIONS WARRANTING REVIEW BY THIS COURT.

Redco's petition has neither raised an undecided federal question nor identified any conflict within the lower courts or with an opinion of this Court. Rather, in a contrived effort to fit the petition within Rule 17.1(a) of the Rules of this Court, Redco implies (at p. 11) that this is a case in which the Court of Appeals for the Third Circuit "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." But no such departure has taken place. Redco merely is complaining that the lower courts' application of Pennsylvania substantive law has precluded its recovery against the respondents. Thus, Redco concludes (p. 30), "Either the Lower Courts are in error or the law should be changed." The lower courts correctly applied the current law of Pennsylvania, and it is fatuous to ask this Court to grant relief by changing state law.

Despite the multiple torts that Redco alleges, in essence this is a libel case. As this Court discussed at length last Term in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. _____, 53 U.S.L.W. 4866 (1985), while such cases frequently present important questions under the First Amendment, significant areas of libel remain committed to state law. This case turned on those state law questions, and it therefore does not present an appropriate occasion for this Court to examine the extent of the First Amendment's protection for defamation.

The lower courts' decisions turned on three major issues. The first was what "defamatory meaning" could be applied to the broadcast. The district court decided that question solely on the basis of Pennsylvania law. A.

132-33, *citing Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899 (1971); *Cosgrove Studio & Camera Shop, Inc. v. Pane*, 408 Pa. 314, 182 A.2d 751 (1962); *Boyer v. Pitt Publishing Co.*, 324 Pa. 154, 188 A. 203 (1936); *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa. Super. 475, 448 A.2d 6 (1982), *leave to appeal denied* (Pa. 1982); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3d Cir. 1980) (applying Pennsylvania law); *Pierce v. Capital Cities Communications, Inc.* 576 F.2d 495 (3d Cir.) (applying Pennsylvania law), *cert. denied*, 439 U.S. 861 (1978); *Fram v. Yellow Cab Co.*, 380 F. Supp. 1314 (W.D. Pa. 1974) (applying Pennsylvania law). The court of appeals did the same. A. 164, *citing Corabi, supra; Cosgrove, supra*. That issue presents no federal question.

Second, the district court held that the statements of fact set forth in the broadcast, including those about deaths and injuries caused by multi-piece rims, were true, applying the "substantial truth" standard established in Pennsylvania. A. 133, *citing Corabi, supra; Kilian v. Doubleday & Co.*, 367 Pa. 117, 79 A.2d 657 (1951); *Dunlap, supra*. In affirming, the court of appeals relied on the opinion of the district court. A. 164-65. Again, the decision was based on Pennsylvania state law.

Redco argues that this Court should grant a writ of certiorari because the lower courts misapplied Pennsylvania law in allocating the burden of proof on the truth question. That state law argument was presented to the court of appeals in Redco's petition for rehearing, and the court of appeals denied the petition. Whether the law of Pennsylvania would require application to these facts of the burden allocation Redco advocates should not be a matter for this Court's review, for this Court does not normally sit in judgment of the correctness of state law determinations by lower federal courts. See, e.g., *Bishop*

*v. Wood*, 426 U.S. 341, 345-47 & n.10 (1976). As discussed below, because of its procedural posture, the burden of proof had no application to this case in any event. Therefore, although the constitutionality of Pennsylvania's burden allocation now is before this Court for consideration, *Philadelphia Newspapers, Inc. v. Hepps*, No. 84-1491, that issue is not relevant to this appeal.

The final major substantive holding by the lower courts was that some of the statements made or implied in the broadcast were opinions absolutely protected from liability. Again, this holding was based on the law of Pennsylvania. A. 134-35, *citing Bogash v. Elkins*, 405 Pa. 437, 176 A.2d 677 (1962); *Braig v. Field Communications*, 310 Pa. Super. 569, 456 A.2d 1366 (1983), *cert. denied*, 466 U.S. _____, 104 S. Ct. 2341 (1984); *Beckman v. Dunn*, 276 Pa. Super. 527, 419 A.2d 583 (1980). The court of appeals affirmed largely on the basis of the Restatement (Second) of Torts § 566 (1977). A. 166. Although the opinion defense has a strong basis in the First Amendment (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)), in Pennsylvania it also is based on the state's Bill of Rights, Pa. Const., Art. I, § 7, which declares the "free communication of thoughts and opinions [to be] one of the invaluable rights of man." *See Bogash, supra*. The Pennsylvania cases cited by the district court relied in part on that state constitutional protection, as well as court-made law developed from the Second Restatement of Torts. Thus, the opinion issue in this case turns largely on state, rather than federal, law.

The contours of the opinion defense under the First Amendment recently have been the subject of debate in the lower federal courts, as well as in this Court. *See, e.g., Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. _____, 105 S.Ct. 2662 (1985). There is no need to explore those contours in this case, however, since the state law protection of opinions under the law of Pennsylvania would remain to defeat

any recovery by Redco. The opinion defense issue therefore is not appropriate for review.

Apart from the substantive questions, Redco also complains about the lower courts' determinations that there were no material factual disputes with respect to the truth of factual statements in the broadcast and the district court's limitation of discovery to material relevant to issues presented by the summary judgment motions. Neither matter warrants review. This Court does not grant certiorari "merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938). The district court's exercise of discretion on the discovery questions was argued to the court of appeals, which found no error. There is no reason for this Court to be concerned with these issues.

In sum, Redco has raised no question in its petition that merits review by this Court. The petition should be denied.

## II. NONE OF THE REASONS STATED BY REDCO PRESENTS A SUFFICIENT LIKELIHOOD OF REVERSAL TO MERIT REVIEW BY THIS COURT.

### A. There Is No Legal Reason To Deny a Broadcaster the Right To State Its Opinion on an Important Matter of Public Safety.

Redco's first argument is that the lower courts erred in holding that opinions stated in the CBS broadcast were protected from liability because broadcasters such as CBS should not have a right to state their opinions. It is no surprise that Redco lacks authority to support its position. Obviously, apart from its inconsistency with Pennsylvania law, Redco's argument is a frontal assault on the First Amendment and the "profound national commitment" to the free exchange of opinions and ideas

that is at its heart. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Redco's argument is particularly unappealing in this case, since it would restrict the free exchange of ideas on a question of product safety that has been subject to scrutiny in federal and state administrative and legislative proceedings. The *60 Minutes* report involved a matter of vital concern to the public. Redco's argument that a broadcast organization such as CBS should have a lesser right to comment on such issues because it can reach a wider audience than other opinionmakers is completely untenable. "[I]n the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities." *Dun & Bradstreet, supra*, 53 U.S.L.W. at 4875 (opinion of Brennan, J.); *see id.* at 4872 (opinion of White, J.).

There was nothing novel about the lower courts' approach to the opinion issues in this case. Although, as noted, application of the opinion defense in some factual situations has provoked judicial debate (*see, e.g. Ollman, supra*), the statements to which the opinion defense was applied in this case —*e.g.*, implied assertions that multipiece rims are dangerous or that their manufacturers are "unethical" — fell clearly within the type of generalized, subjective judgments that are incapable of proof and that uniformly have been accorded opinion status by the courts. *See generally Lauderback v. American Broadcasting Cos.*, 741 F.2d 193 (8th Cir. 1984), *cert. denied*, 469 U.S. _____, 105 S. Ct. 961 (1985); *National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc.*, 705 F.2d 98 (4th Cir.), *cert. denied*, 464 U.S. 830 (1983); *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y. 2d 369, 397 N.Y. Supp. 2d 943, 366 N.E.2d 1299, *cert. denied*, 434 U.S. 969 (1977); *Beckman v. Dunn*, 276 Pa.

Super. 527, 419 A.2d 583 (1980). Redco wishes to change this uniform law so that opinions may be declared false. A society that tolerates only "correct" opinions will have lost a critical measure of its freedom.

In any event, the real question here is not whether the federal Constitution compels the protection of opinions afforded by the lower courts in this case, but, since that protection was based largely (if not entirely) on state law, whether the Constitution prohibits Pennsylvania from affording such protection. Redco's petition (at pp. 15-16) argues that the protection of opinions somehow deprives it of property rights under the Fifth Amendment. Redco cites no authority in support of that argument, and respondents are aware of none. The argument is unreasoned and little more than frivolous.

### B. The Lower Court Correctly Determined That There Was No Material Issue of Fact Relating to the Truth of Any Relevant Factual Statement in the Broadcast.

The district court held that, even though Redco was not named in the broadcast, it might have been considered the subject of the broadcast because it is one of a small group of multi-piece rim manufacturers. A. 128-32. Relying on that holding, Redco repeatedly has argued that every statement made in the broadcast, such as the statement that some multi-piece rims have caused deaths, must be read as though it referred directly to Redco itself. Redco then has sought to amass evidence that those specific statements might not be true insofar as they applied to Redco. In particular, it has argued that there is no evidence that anyone has died as a result of explosive separation of a Redco rim, although it does not dispute that persons have been injured by Redco rim parts (S.A. 13) and that scores of persons have died as a result of separations of rims made by other members of the small group of which Redco claims to be a part (S.A. 13-15). In concluding this jerry-built argument, Redco

asserts that, because it has presented evidence disputing application of these specific statements in the program to Redco, summary judgment with respect to the truth of these statements should have been denied.

As previously noted, the question of which material facts in the record were and were not disputed is not an appropriate question for review by this Court. In the first place, Redco's characterization of the record before the district court is highly misleading. Many of the affidavits and other materials included in Redco's appendix, A. 46-116, were not presented to the district court until *after* that court had entered summary judgment in favor of CBS. They were before the court with respect to the Institute's summary judgment motion, but, at that point, the proffered evidence was so inherently unreliable that it could be ignored. *See, e.g. Dudo v. Schaffer*, 91 F.R.D. 128, 132-33 (E.D. Pa. 1981).

More significantly, however, none of the statements that Redco seeks to have interpreted as applying to it was reasonably subject to the interpretation Redco seeks, so that whatever material was in the record on those issues could not change the result. The district court considered Redco's proposed misinterpretations of the broadcast, and it labeled them "excessive." A. 158 n.1. The court of appeals found Redco's suggested construction of the broadcast "unreasonable." A. 165. The lower courts based these conclusions on Pennsylvania law, which prescribes rules for assessing the reasonable meaning of an allegedly defamatory publication. Their determinations were entirely correct, and they do not require further review here.

Apart from Redco's misinterpreted statements, the district court carefully reviewed the record, including the cross-statements of uncontested facts, and found that, with respect to the *material* factual issues (such as injuries and deaths from multi-piece rims in general, and

proposals that the rims be banned) there was no genuine dispute. After reviewing the record, the court of appeals affirmed. There is no reason for this Court to conduct another review of the facts.

### C. This Court Should Not Grant Certiorari To Determine the Appropriate Allocation of the Burden of Proving Truth Under Pennsylvania Law.

Redco's third argument in its petition is based entirely on state law. Redco points out that, after the district court entered judgment for respondents, the Supreme Court of Pennsylvania held that the burden of proving truth in a defamation case brought by a plaintiff that is not a public official or a public figure must be placed on the defendant. *Hepps v. Philadelphia Newspapers, Inc.*, _____Pa. _____, 485 A.2d 374 (1984), *prob. jur. noted*, 472 U.S. _____, 53 U.S.L.W. 3894 (1985) (No. 84-1491). Redco argues that the new decision made a "dramatic change in the law" (p. 25) that justified reversal and a remand to the district court. The *Hepps* decision was called to the attention of the court of appeals during briefing in that court, and Redco made its state law argument based on *Hepps* in its petition for a rehearing. The court of appeals rejected the argument. Apart from the fact that the question is entirely one of Pennsylvania law, there are a number of reasons why this issue does not merit review here.

First, although the district court's opinion did discuss the burden of proving truth under Pennsylvania law, A. 133-34, the court made clear that it did not rely on allocation of the burden in deciding the case. Instead, because it was faced with a motion for summary judgment, the district court correctly stated that it could render judgment "only if no genuine issue as to any material fact exists," and that, in making that determination, it had to "view the evidence in a light most favorable to the non-moving party." A. 136 n.6. The remainder of the

opinion made clear that the court was not weighing evidence, but was looking for material factual disputes and finding that none existed.

Second, as evident from Redco's own petition (p. 26), the burden allocation would have affected the result only if statements in the broadcast were interpreted to have the "excessive" and "unreasonable" meanings rejected by each of the lower courts, for Redco's twisted interpretations are the only ones that could give rise to any dispute about truth. Thus, Redco is arguing for reversal and a remand so that the lower courts can consider who has the burden of proving the truth of statements about Redco that could not reasonably be deduced from the program. Clearly, that would be a useless act.

Third, Redco overstates the breadth and significance of the *Hepps* decision. Rather than declaring a "dramatic change in the law," that decision merely upheld a longstanding provision of Pennsylvania law that has been codified by statute, 42 Pa. C.S. § 8343(b)(1). The novelty of the decision was its inconsistency with recent First Amendment jurisprudence, but the statute upon which the decision was based was available for invocation by Redco at the time it filed suit, if Redco wished to rely upon it.

Moreover, it is highly doubtful that the *Hepps* decision applies to this case at all. It relates only to claims for defamation, and only to such claims by private-figure plaintiffs. Thus, the product disparagement claim asserted by Redco would continue to be subject to the Pennsylvania rule that the plaintiff is required to prove falsity. *See, e.g., Young v. Geiske*, 209 Pa. 515, 58 A. 887 (1904). And, since Redco probably will be held to be a public figure (a determination that has not yet been made), the *Hepps* decision in all likelihood will have no application to Redco's defamation claims either.

In summary, there is no reason for this Court to accept review of this case so that it can try to correct an asserted error of Pennsylvania law that had no effect on the result and has a highly questionable application to this case.

**D. The Discovery Issues Involved Were Clearly Within the District Court's Discretion.**

Finally, Redco complains that it did not have an adequate opportunity to conduct discovery in this case. Again, Redco's recitation of the events relating to discovery and the state of the record are misleading. The district court gave Redco ample opportunity to present any factual information and conduct any discovery that was necessary to deal with the issues raised on the motions for summary judgment. S.A. 4, 6. Redco failed to avail itself of that opportunity.

The district court's regulation of discovery was an entirely correct exercise of its discretion. The material that Redco sought to discover related largely to questions such as actual malice. It consisted of materials relating to CBS' editorial processes, including reporters' notes and memoranda and tapes of unbroadcast material. In Pennsylvania, such materials are statutorily privileged from disclosure. Pennsylvania Shield Law, 42 Pa. C.S. § 5942. *See generally In re Taylor*, 412 Pa. 32, 40, 193 A.2d 181, 185 (1963); *Lal v. CBS, Inc.*, 726 F.2d 97, 100 (3d Cir. 1984); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 277-79 (3d Cir. 1980). Redco thus was not entitled to the requested discovery under Pennsylvania state law.

Apart from the statute, the district court had sound reasons for limiting the discovery to evidence relevant to the summary judgment motion. Discovery permitted without that restriction would have been wasteful and expensive and would have required determination of constitutional arguments raised by Redco to avoid the

Pennsylvania Shield Law privilege. S.A. 2-4. The district court's discovery rulings were a sound approach to the delicate constitutional questions that arise in defamation cases. *See McBride v. Merrell Dow & Pharmaceuticals, Inc.*, 717 F.2d 1460, 1466-67 (D.C. Cir. 1983). Nothing about them requires review by this Court.

## CONCLUSION

Redco's petition for certiorari presents no issue that merits the time or attention of the Supreme Court of the United States. Redco's petition should be denied.

Respectfully submitted,

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# Supplemental Appendix.

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## DISTRICT COURT MEMORANDUM AND ORDER OF APRIL 25, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| REDCO CORPORATION, | : | |
| | : | |
| *Plaintiff* | : | |
| | : | |
| *vs.* | : | CIVIL ACTION |
| | : | NO. 82-0263 |
| CBS, INC., and THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY, | : | |
| | : | |
| *Defendants* | : | |

### MEMORANDUM

### I. PROCEDURAL HISTORY

On March 3, 1981, Defendant CBS, Inc., through its news division, CBS News, broadcast a program known as *60 Minutes*. One segment of the show was entitled "Killer Wheels", which concerned the use of multi-piece tire rims on the wheels of large motor vehicles. The segment addressed the issue of whether certain multi-piece rims presented a safety hazard. CBS broadcast this segment again on September 6, 1981.

On March 3, 1982, Redco Corporation [hereinafter Redco], a Pennsylvania corporation that manufactures particular types of multipiece rims, filed suit against CBS and The Insurance Institute for Highway Safety [hereinafter Institute]. The complaint averred four causes of action: trade libel-disparagement, defamation, intentional interference with existing and prospective business relations, and conspiracy. Timely answers were filed by CBS on April 19, 1982, and by the Institute on

April 27, 1982. Thereafter, discovery proceeded between the parties.

On December 10, 1982, Redco moved for an order to compel certain discovery. Redco sought a number of documents from CBS, including transcripts or tapes of interviews conducted in preparation of "Killer Wheels" but not actually broadcast, identification of composite editing and of "reaction shots" and "reverse shots" made out of the natural time sequence, producers' "blue sheets", and correspondence concerning the broadcast. Redco additionally sought to compel CBS to answer a number of interrogatories. CBS opposed Redco's motion, alleging that the materials and information were protected from disclosure by the Pennsylvania Shield Law,[1] the New York Shield Law, the First Amendment of the United States Constitution, and the Pennsylvania Constitution.

On the same date that it filed its brief opposing Redco's motion to compel, December 27, 1982, CBS moved for summary judgment against Redco. CBS raised four grounds in support of summary judgment. Pursuant to Local Rule 401.4, CBS also submitted a statement of material facts as to which it contended no genuine issues existed to be tried.

Redco did not file a response to CBS' motion for summary judgment but, rather, it moved for a continuance of the motion on January 17, 1983. Redco averred that it needed to complete various areas of discovery before it could present facts necessary to oppose CBS' motion. We granted Redco's motion for a continuance on January 18, 1983, before CBS could submit an opposing brief to the motion. Thereafter, on January 27, 1983, CBS moved this court to reconsider our order granting Redco a continuance. The issue has been fully briefed and is ripe for consideration.

---

1. 42 Pa. C.S.A. §5942 (Purdons 1982).

## II. CBS' MOTION FOR RECONSIDERATION

CBS desires us to revoke our January 18, 1983, order that granted Redco a continuance to oppose CBS' motion for summary judgment. In its motion and brief, CBS raises a number of reasons why we should reconsider that motion. First, CBS argues that it never had an opportunity to respond to Redco's motion for a continuance. Additionally, CBS maintains that should it prevail on any of its four grounds for summary judgment, no further discovery will be necessary. Such a result would save further expenditures of time and money. Moreover, the court would be able to avoid addressing constitutional questions concerning alleged free press issues.

CBS also asserts that the discovery completed to date is sufficient to defend the summary judgment motion. The discovery Redco seeks to obtain, CBS claims, is not relevant to the legal issues CBS raises in its summary judgment motion. Even should the court determine that Redco is entitled to further discovery, CBS argues that such discovery should be limited to that necessary for resolution of the summary judgment motion.

We find CBS' arguments and reasoning persuasive. While we cannot absolutely conclude that Redco is not entitled to further discovery, we believe Redco should be required to establish how any discovery it seeks relates to an issue raised in the summary judgment motion. There is no reason to unnecessarily extend discovery if it is possible that various legal arguments, or existing facts not in dispute, will resolve all, or part, of Redco's action. As Redco's January 17, 1983, motion for an extension of time to complete discovery reveals, the discovery Redco proposes is extensive. The parties surely will expend a great deal of time and money in completing such discovery, which will further delay any resolution of this case.

In addition, we agree with CBS that there is no need to address the constitutional issues raised by both parties if the action can be decided by other means. Courts should avoid inquiry into constitutional questions whenever possible unless such adjudication is unavoidable. HARRIS v. McRAE, 448 U.S. 297, 307 (1980), *citing*, SPECTOR MOTOR SERVICE, INC. v. McLAUGHLIN, 323 U.S. 101, 105 (1944). Nevertheless, we will not ignore constitutional issues to the prejudice of Redco. Rather, if Redco can persuade us that further discovery is necessary to fully defend the summary judgment motion, which discovery CBS opposes on constitutional and statutory grounds, we certainly will resolve the issues.

Therefore, we will revoke our order granting Redco a continuance to oppose CBS' motion for summary judgment and we will direct Reco to respond to CBS' motion and brief. Redco is also directed to respond to CBS' alleged undisputed facts as presented in CBS' statement and addendum under Local Rule 401.4. If Redco believes further discovery is necessary to dispute those facts, Redco shall explain what disputes exist and what discovery is necessary to resolve the issue.

Our order is not to be misconstrued as limiting Redco to disputing (if indeed Redco does) the factual averments listed in CBS' Local Rule 401.4 statement and addendum. To the contrary, Redco should clearly enumerate *all* factual questions it believes must be determined before the summary judgment motion as presented by CBS can be decided. Redco must state why the motion cannot be decided without clarification of these facts. Should we find further discovery to be necessary, a discovery conference may be held to attempt to resolve objections by the parties.

## III. REDCO'S MOTION FOR A PROTECTIVE ORDER

As a final point, we note that on March 28, 1983, Redco moved for a protective order. No supporting brief has been filed to date. In a letter filed April 6, 1983, however, counsel for CBS responded that CBS did not oppose the motion, subject to clarification by Redco on one point.

While we do not believe the parties are in disagreement as to Redco's motion for a protective order, we cannot conclusively determine this as the record now stands. Since Redco has not filed a supporting brief pursuant to Local Rule 401.5, we will deem Redco's motion withdrawn without prejudice. If all parties agree to Redco's proposed motion, the protective order should be submitted as a stipulation. If the protective order is disputed, Redco may resubmit its motion.

An appropriate order will be entered.

/s/ R. DIXON HERMAN
R. DIXON HERMAN
UNITED STATES DISTRICT JUDGE

Dated: April 25, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| REDCO CORPORATION, | : | |
| | : | |
| *Plaintiff* | : | |
| | : | |
| *vs.* | : | CIVIL ACTION |
| | : | NO. 82-0263 |
| CBS, INC., and THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY, | : | |
| | : | |
| *Defendants* | : | |

**ORDER**

AND NOW, this 25th day of April, 1983, in accordance with the memorandum released this date in the above-captioned action, IT IS HEREBY ORDERED that:

1. Defendant CBS' motion for reconsideration is granted.

2. The January 18, 1983, order of court granting Plaintiff Redco a continuance to oppose CBS' motion for summary judgment is terminated.

3. Redco is directed to respond to CBS' motion and brief for summary judgment, in addition to CBS' Local Rule 401.4 statement and addendum.

4. Redco is directed to enumerate any facts which are material to CBS' summary judgment motion that it alleges are in dispute or need to be identified. Redco is further directed to explain why it believes such facts are material.

5. Redco is granted twenty (20) days from the date of this order to comply with paragraphs three and four of this order.

6. Defendant CBS is granted fifteen (15) days from service of Redco's response to answer.

7. Redco is granted ten (10) days from service of CBS' answer to file a reply, if it so desires.

8. Redco's motion for a protective order is deemed withdrawn without prejudice to Redco's right to resubmit such motion.

/s/ R. DIXON HERMAN

R. DIXON HERMAN
UNITED STATES DISTRICT JUDGE

## COURT OF APPEALS JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5525

REDCO CORPORATION, *Appellant*

*vs.*

CBS, INC. and
THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY

(D. C. Civil No. 82-0263)

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

Present: ALDISERT, *Chief Judge,* SLOVITER, *Circuit Judge* and STAPLETON, *District Judge**

**JUDGMENT**

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted pursuant to Third Circuit Rule 12(6) March 28, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered July 16, 1984, be, and the same is hereby affirmed. Costs taxed against the appellant.

ATTEST:

/s/ SALLY MRVOS
Clerk

April 9, 1985

1. * Honorable Walter K. Stapleton, Chief Judge of the United States District Court for the District of Delaware, sitting by designation.

Costs taxed in favor of Appellee, Insurance Institute for Highway Safety as follows:
Brief ..... $112.80

Costs taxed in favor of Appellee, CBS, Inc. as follows:
Brief ..... $152.00

Certified as a true copy and issued in lieu of a formal mandate on May 15, 1985.

Test: /s/ M. ELIZABETH FERGUSON

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

## COURT OF APPEALS ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5525

REDCO CORPORATION,

*Appellant*

*v.*

CBS, INC. *et al.*

**SUR PETITION FOR REHEARING**

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER *Circuit Judges*, and STAPLETON, *District Judge**

The petition for rehearing filed by Appellant, Redco Corporation, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ DELORES K. SLOVITER
Circuit Judge

Dated: May 7, 1985

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* Hon. Walter K. Stapleton, Chief Judge, United States District Court for the District of Delaware, sitting by designation.

# SIDE-BY-SIDE COMPARISON OF STATEMENTS OF UNCONTESTED FACTS PRESENTED TO DISTRICT COURT IN CONNECTION WITH MOTIONS FOR SUMMARY JUDGMENT PURSUANT TO DISTRICT COURT LOCAL RULE 401.4

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| | |
|---|---|
| **1. Defendant's Statement**<br>A multi-piece rim consists of a rim base that supports a tubeless tire and one or more side or locking rings that hold the inflated tire onto the rim base by acting as a flange that confines the tire bead. | **1. Plaintiff's Counterstatement**<br>A multi-piece rim consists of a rim base that supports a tube-type tire, inner tube, and flap, and on one or more sides are locking rings that hold the tire tube and flap on to the rim base by acting as a second flange that confines the tire bead during and after inflation. Multi-piece rims were generally limited in their application for use on trucks. |
| **2. Defendant's Statement**<br>There are more than 25 different types or designs of multi-piece rims. | **2. Plaintiff's Counterstatement**<br>While there are additional multi-piece rim designs, just about all of the rims in service in the United States are limited to nine (9) basic types or designs. |
| **3. Defendant's Statement**<br>K-, KB-, KW-, and KWX- type rims were made by Goodyear Tire & Rubber Company. | **3. Plaintiff's Counterstatement**<br>Admitted. |
| **4. Defendant's Statement**<br>Redco Corporation ("Redco") has not made K-, KB-, KW-, or KWX- type rims. | **4. Plaintiff's Counterstatement**<br>Admitted. |
| **5. Defendant's Statement**<br>RH 5° rims were made by Firestone Tire & Rubber Co., Kelsey-Hayes Co., and Budd Company. | **5. Plaintiff's Counterstatement**<br>Admitted. |

**6. Defendant's Statement**
Redco has not made RH 5° type rims.

**6. Plaintiff's Counterstatement**
Admitted.

**7. Defendant's Statement**
Redco has not made any of the same types or designs of multi-piece rims as have been made by Goodyear Tire and Rubber Co., Firestone Tire & Rubber Co., Kelsey-Hayes Co., or Budd Company.

**7. Plaintiff's Counterstatement**
Redco Corporation, Firestone Tire and Rubber Company, Kelsey-Hayes Company, Budd Company and Goodyear Tire and Rubber Company have all manufactured multi-piece rims as defined in statement 1 and as defined in the "60 Minutes" segment "Killer Wheels" broadcast by the defendant on March 8, 1981 and September 6, 1981. It is noted that when CBS, Inc. portrayed the film produced by the Insurance Institute for Highway Safety, the test rims used in that film were of the two piece design, similar to those manufactured by Redco Corporation. The other manufacturers of multi-piece rims referred to in the "Killer Wheels" program all manufacture a two piece, multi-piece rim whose designs, though not exactly as that of Redco's, are similar in sizes, have the same intended usage and are maintained in similar ways.

**8. Defendant's Statement**
Multi-piece rims are used on trucks and other large motor vehicles.

**8. Plaintiff's Counterstatement**
Multi-piece rims are primarily used on trucks and other large motor vehicles, including buses and off the road equipment.

**9. Defendant's Statement**
There are millions of multi-piece rims in use on the highways.

**9. Plaintiff's Counterstatement**
There are between 50,000,000 and 100,000,000 multi-piece rims in use on the highways.

**10. Defendant's Statement**
Incidents have occurred in which multi-piece rims have separated while a tire was inflated, propelling rim pieces outward at great force.

**10. Plaintiff's Counterstatement**
A properly assembled multi-piece rim will not separate while a tire is being inflated or is being contained in an inflated manner. Explosive separation of multi-piece rims have occurred when parts have been mismatched, when damaged or worn parts have been used, when parts have been improperly assembled and where other misuse has occurred, including the failure to follow recognized safety handling procedures.

**11. Defendant's Statement**
Rim pieces propelled outward during such separations have struck persons in the head or other parts of their bodies.

**11. Plaintiff's Counterstatement**
It is admitted that persons have been injured or killed by the explosive separation of multi-piece rims. However, if proper safety procedures had been followed, the injuries would not have occurred. In addition, on and before March 8, 1981, Defendant had no evidence that a properly assembled Redco rim consisting of all Redco components had killed anyone.

**12. Defendant's Statement**
Hundreds of injuries have resulted from multi-piece rim separations.

**12. Plaintiff's Counterstatement**
During the period 1970 to 1978, 368 injuries resulted from 549 documented multi-piece rim separations. See Phase III report, p. 9, Plaintiff's Appendix "A".

**13. Defendant's Statement**
The impact of rim pieces propelled outward during rim separations has caused some persons to die.

**13. Plaintiff's Counterstatement**
During the period 1970 to 1978, 89 fatalities resulted from 549 documented multi-piece rim separations. See Phase III report, p. 9, Plaintiff's Appendix "A".

**14. Defendant's Statement**
More than 50 deaths have resulted from multi-piece rim separations.

**14. Plaintiff's Counterstatement**
Admitted.

**15. Defendant's Statement**
The fact that injuries and deaths have resulted from multi-piece rim separations was disclosed during the *60 Minutes* broadcasts at issue.

**15. Plaintiff's Counterstatement**
The "60 Minutes" segment "Killer Wheels" reported that more than 100 deaths and at least 400 injuries involving multi-piece rim explosions have occured. However, this representation was made in the context that single piece rims are a safe alternative. This is false. CBS, Inc. knew on and before March 8, 1981 that single piece wheel components present the same risk of harm as multi-piece wheel components.

**16. Defendant's Statement**
The *60 Minutes* broadcasts truthfully reported that "Spud" James was hit in the head with a piece of a rim that separated explosively while air was being put in a truck tire and that he lost his speech and is partially paralyzed as a result.

**16. Plaintiff's Counterstatement**
The "60 Minutes" segment "Killer Wheels" contained a report that Spud James was injured during a multi-piece rim separation. The Defendant, despite knowledge of the same, did not report that Spud James and his companions had misassembled the wheel prior to its separation and had not followed simple safety procedures. See Deposition of Dr. McCarthy, p. 78.

**17. Defendant's Statement**
The *60 Minutes* broadcasts truthfully reported that Eric Ehmann was killed when hit in the head by a piece of a rim that separated explosively after he had removed an inflated truck tire from a safety cage.

**17. Plaintiff's Counterstatement**
The "60 Minutes" segment "Killer Wheels" reported that Eric Ehmann was killed during a multi-piece rim separation. The program, though possessing the information, however, failed to disclose that Mr.

Ehmann had not been properly trained to service multi-piece rims and that this fact was extremely important to Mrs. Ehmann who had urged NHTSA to require proper training in tire-wheel assembly. See Deposition of Dr. McCarthy only.

**18. Defendant's Statement**
The *60 Minutes* broadcasts truthfully reported that Clifford Griggs was hit in the face with a piece of a rim that separated explosively because the parts were mismatched, causing him to suffer from traumatic epilepsy.

**18. Plaintiff's Counterstatement**
Admitted.

**19. Defendant's Statement**
In 1979, the National Highway Traffic Safety Administration (NHTSA) reported 439 explosive separations of multi-piece rims, 71 of which resulted in one or more deaths and 234 of which resulted in serious injuries.

**19. Plaintiff's Counterstatement**
While the National Highway Traffic and Safety Administration may have reported the explosive separation alleged, in fact, the actual number of explosions and deaths are set forth in paragraph 12 and 13.

**20. Defendant's Statement**
In 1980, the Occupational Safety and Health Administration (OSHA) reported that approximately 65% of all rim accidents result in injury and approximately 15% are fatal.

**20. Plaintiff's Counterstatement**
In 1980, OSHA reported that approximately 63% of all rim accidents resulted in injury and approximately 13% are fatal, 24% resulted in no injury, 45 F.R. 6707 (1-29-80). These statistics reflect accident rates prior to the promulgation of OSHA safety statistics.

**21. Defendant's Statement**
In 1982, NHTSA reported that it had verified 549 explosive separations of multi-piece rims between 1954 and 1978, resulting in 368 injuries and 89 deaths.

**21. Plaintiff's Counterstatement**
Admitted. Except, the National Highway Traffic and Safety Administration also noted that the new OSHA standard would reduce the number of multi-piece rim separation incidents.

**22. Defendant's Statement**
Among the persons who have been killed or injured by explosive separations of multi-piece rims are persons who were not involved in servicing the rims or tires.

**22. Plaintiff's Counterstatement**
CBS has made it appear that large numbers of people not involved in servicing the rim were killed or injured. In fact, CBS knew injuries from multi-piece rims were more rare than deaths from random lightning strikes. (Ten times as many persons are killed by lightning.) Deaths or injuries of by-standers is known to be incredibly rare.

**23. Defendant's Statement**
Some rim separations have occurred after rim and tire servicing was completed.

**23. Plaintiff's Counterstatement**
Admitted. Except, 75% to 80% of all multi-piece rim separations occur during servicing. 47 F.R. 8232 (2-25-82).

**24. Defendant's Statement**
NHTSA defect investigations disclosed 27 deaths from reported Pinto gas tank accidents.

**24. Plaintiff's Counterstatement**
The Plaintiff has been unable to verify the allegation in 24. However, if 27 deaths were reported as a result of the Pinto gas tank explosion, the Pinto was not manufactured in the volume and used for the time that multi-piece rims were manufactured and used. Statistically, the death rate in Pinto gas tank explosions will show a substantially higher rate of death than found with multi-piece rims. The comparison in the context presented: (a) that the rims are more dangerous than those on cars and kill more people than the Pinto is a false statement.

**25. Defendant's Statement**
A NHTSA defect investigation disclosed 41 deaths from reported accidents involving the Firestone 500 Tire.

**25. Plaintiff's Counterstatement**
While a NHTSA defect investigation may have disclosed 41 deaths from reported accidents involving the Firestone 500, the

deaths would be attributed to 10,000,000 tires. From the risk analysis made by Analysis Associate and designated the Phase III report, CBS knew that at least 58,700,000 multi-piece rims were in service in 1978. This figure is 5.87 times more that the 10,500,000 tires manufactured. Therefore, there were 2.7 times more than the 89 deaths reported in multi-piece rim accidents, suggesting that the statement that the rims are more dangerous than the Firestone tire is false.

**26. Defendant's Statement**
In 1969, Paul Hykes, a former Budd Company engineer, suggested that RH 5° rims be removed from the market.

**26. Plaintiff's Counterstatement**
In 1969, Paul Hykes, a former Budd Company engineer, did suggest that RH 5° rims be removed from the market. However, the representative of CBS, Inc. contacted Mr. Hykes prior to the publication of the March 8, and September 6, 1981 programs. This representative was informed by Mr. Hykes that he had recanted his view, that he was "wrong" in 1969, and that when he became fully informed of the safety record of the RH 5° rim, he changed his mind. These facts were not used by CBS, Inc. when broadcasting their program.

**27. Defendant's Statement**
In 1969, the National Tire Dealers and Retreaders Association passed a resolution recommending elimination of multi-piece rims as hazardous.

**27. Plaintiff's Counterstatement**
While in 1969 there was a resolution passed by the National Tire Dealers and Retreaders Association recommending the elimination of multi-piece rims as hazardous, in the docket in 1979, the organization reversed

itself and in 1979 there are letters marked as Plaintiff's Appendix "I" and "J", which showed that this organization opted for the OSHA standards as opposed to the banning of multi-piece rims. This information was known to CBS at the time of the broadcast.

**28. Defendant's Statement**
Goodyear Tire & Rubber Co. engineers authored a report that called multi-piece rims "inherently dangerous," and a Goodyear training film emphasized the need for caution in dealing with them.

**28. Plaintiff's Counterstatement**
This fact is disputed. One of the subjects of the Plaintiff's efforts in discovery is to obtain the report which is mentioned in the program. The reference to the inherently dangerous product Plaintiff believes was to refer to the "K" rim which statistically proved to be more prone to explosive separation than other rim designs. However, since the Defendant has failed and refuses to turn this information over to the Plaintiff, this is a matter in dispute. In addition, the Goodyear film on the program did not refer to "all multi-piece rims." In addition, there is a need for caution when servicing single piece wheels as the same potential force is contained in a pressurized tubeless tire.

**29. Defendant's Statement**
From 1969 to 1974, NHTSA investigated the RH 5° rim, and it secured a commitment that its manufacturers would cease production of it.

**29. Plaintiff's Counterstatement**
The production of the RH 5° rim was phased out in 1973 due to obsolescence of the design. NHTSA did not secure commitment from the manufacturers of that rim. NHTSA found no defect in the design of this rim.

**30. Defendant's Statement**
NHTSA also investigated K-type rims and secured a commitment from Goodyear Tire & Rubber Co. that it would cease production of them.

**30. Plaintiff's Counterstatement**
The "K" type rim was phased out in 1972 before the NHTSA investigation was completed. Plaintiff believes that there was no defect in the design of this rim to be found by NHTSA.

**31. Defendant's Statement**
In 1979, NHTSA began an investigation to determine whether multi-piece rims should be banned, and in 1980 it announced that a ban was contemplated.

**31. Plaintiff's Counterstatement**
In 1980, NHTSA did not ask the manufacturers of "K" type and RH 5° degree rims to voluntarily recall those in use. On the contrary, an unauthorized letter was written by an employee of NHTSA.

**32. Defendant's Statement**
In 1980, NHTSA asked the manufacturers of K-type and RH 5° rims voluntarily to recall those in use, but the manufacturers declined.

**32. Plaintiff's Counterstatement**
A letter marked Plaintiff's Appendix "K" clarifies the authority of the so-called "Bradford" letter and clearly suggests that it did not constitute a request by NHTSA to voluntarily recall these rims.

**33. Defendant's Statement**
The CBS broadcasts in 1981 truthfully reported that NHTSA was considering a ban of multi-piece rims and that it had asked the manufacturers of some rim types to recall them but that the manufacturers had declined.

**33. Plaintiff's Counterstatement**
The CBS broadcast was in error in that it reported that NHTSA was considering a ban when in fact NHTSA was considering a petition filed by the Defendant, Insurance Institute for Highway Safety, requesting a ban. Also, that the NHTSA had asked the manufacturers of some type rims to recall them and that the manufacturers had declined. On the contrary, an unauthorized letter by an employee of NHTSA had been sent out and which had been denied by the industry. See Plaintiff's Appendix "K". It is also noted that in the program

"Killer Wheels" there was no specification that the request for an alleged recall involved only two types of multi-piece rims.

**34. Defendant's Statement**
In 1980, OSHA promulgated a safety standard for servicing multi-piece rims.

**34. Plaintiff's Counterstatement**
In 1980, OSHA promulgated a safety standard for servicing multi-piece rims. 45 F.R. 6706 et seq. (1-29-80), this safety standard is expected to eliminate the primary cause of multi-piece rim separations that is mishandling by tire service persons.

**35. Defendant's Statement**
In April 1981, NHTSA announced its intention to terminate its rulemaking proceeding for a ban on multi-piece rims.

**35. Plaintiff's Counterstatement**
NHTSA terminated its rule making proceedings for a ban on multi-piece rims in 1982. 47 F.R. 8232 (2-25-82).

**36. Defendant's Statement**
Safety legislation or regulations for multi-piece rims have been enacted in at least four states and such enactments have been considered in Pennsylvania.

**36. Plaintiff's Counterstatement**
Admitted. However, all of the jurisdictions have adopted OSHA type servicing regulations for multi-piece rims and after investigation none of them have found the rim to be unsafe or have declared it unsafe.

**37. Defendant's Statement**
Exhibit A to Redco's complaint is a correct transcript of the *60 Minutes* broadcasts at issue.

**37. Plaintiff's Counterstatement**
It is incorrect to admit that Exhibit A to Redco's Complaint is a correct transcript of the "60 Minutes" broadcast. This is because the broadcast included visual matters as well as the written matter. When the visual matter is considered along with the written matter, additional and persuasive untruthful and libelous material is presented. For example, the manner in which the manufacturers' "side"

is presented by editing techniques, close-ups and other visual manipulation, suggest they are untruthful in their position where the contrary is presented as the truthful "side" of the innocent victim and the public. Also, a diagram showing the explosive separation of a multi-piece rim is highly misleading for a properly seated multi-piece rim is incapable of explosive separation.

**38. Defendant's Statement**
In 1977, NHTSA promulgated a motor vehicle safety standard requiring rim components to be marked with information to enable proper matching.

**38. Plaintiff's Counterstatement**
Admitted.

**39. Defendant's Statement**
In 1978, Roman L. Brooks, a NHTSA staff member, prepared a report discussing the multi-piece rim problem.

**39. Plaintiff's Counterstatement**
Roman L. Brooks, a NHTSA staff member, prepared an internal memorandum from information obtained from an attorney representing Plaintiff in multi-piece litigation. The memorandum prepared in 1978 is not a NHTSA report and is in no way an official government report. In fact, the Defendant's counsel, either by inadvertence or by design, failed to reproduce the second page of said report noted as Exhibit F in its appendix to Memorandum in Support of Motion for Defendant, CBS, Inc., Summary Judgment. A copy of that second page is marked Plaintiff's Appendix "F" and is included therein. This Exhibit indicates that the document does not express the opinions, findings and conclusions of the

National Highway Traffic and Safety Administration. See also paragraph 21 of Plaintiff's Appendix "E".

**40. Defendant's Statement**
At no time did the *60 Minutes* broadcasts at issue mention Redco by name.

**40. Plaintiff's Counterstatement**
The "60 Minutes" segment "Killer Wheels" referred to four major manufacturers suggesting that there were other *manufacturers*. Also, the program referred to "all" the manufacturers of multi-piece rims at least *twelve* times during the program. While Redco Corporation was not mentioned by name during the program since there are only "six" manufacturers of multi-piece rims, by necessity, the general reference to the manufacturers of multi-piece rims included Redco Corporation.

**41. Defendant's Statement**
At no time did the *60 Minutes* broadcasts at issue mention by name any of the rim types manufactured by Redco.

**41. Plaintiff's Counterstatement**
While at no time did the "60 Minutes" broadcast at issue mention by name any of the rim types manufactured by Redco, the program in fact referred to multi-piece rims, in a generic sense, at least 35 times. In fact, the multi-piece rim which formed the basis of the alleged test film made by the Insurance Institute for Highway Safety, was a rim of design similar to that of the Redco rim.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Pennsylvania Bill of Rights, Article I, §7 of the Pennsylvania Constitution, provides in relevant part:

> The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.

The Pennsylvania Shield Law, 42 Pa. C.S. § 5942, provides:

> (a) *General Rule.* — No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.
>
> (b) *Exception.* — The provisions of subsection (a) insofar as they relate to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection, for a period of at least one year from the date of the actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast.